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REPORTS

OF

CASES

BEFORE

THE HIGH COURT

AND

CIRCUIT COURTS OF JUSTICIARY

IN SCOTLAND,

FROM 3 JANUARY 1838 TO 23 DECEMBER 1841.

BY

ARCHIBALD SWINTON, ESQ.

ADVOCATE.

VOL. II.

EDINBURGH:

THOMAS CLARK, LAW-BOOKSELLER.

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PREFACE.

THE present volume, taken in connexion with that previously published, extends these Reports over a period of upwards of six years, namely, from November 1835 to the close of 1841. No exertion has been spared to render the work a complete and accurate record of all important legal questions which have occurred during that period, in the Justiciary Court, either in Edinburgh, or on the Circuits. In consequence of the unavoidable absence of the Reporter from Scotland, during a portion of the time embraced in the present volume, namely, from July 1840 to November 1841, it is possible that some cases which ought to have been reported, may have been omitted. Should this be the case, it is hoped that the circumstances under which this part of the publication has been compiled will afford a sufficient apology. For the materials comprising this portion of the work, he is indebted, principally, to the talents and industry of his friend Mr. Archibald Broun, Advocate.

The present Reporter's connexion with the work is not to extend beyond the close of this volume. He cannot dismiss the task in which he has been engaged, without expressing his warmest acknowledgments, for the valuable encouragement and assistance which he has received in its performance, from the Lord Justice General, and the other Judges of the Court of Justiciary, from the various Gentle-

men who have filled the offices of Crown Counsel, and from many others of his friends at the Bar. The views with which the publication was undertaken, have been amply realized by the opinion of those best qualified to judge of the utility of such a work. And, in retiring from an employment in which he has experienced much satisfaction, the Reporter has the fullest confidence that his place will be ably filled by Mr. Broun, by whom these Reports will be regularly continued.

9. Gloucester Place,
Edinburgh, 1*st March* 1842.

JUDGES

OF THE

COURT OF JUSTICIARY

DURING THE PERIOD OF THESE REPORTS.

LORD JUSTICE GENERAL,

1837. THE RIGHT HONOURABLE CHARLES HOPE, (Resigned in October 1841.)
1841. THE RIGHT HONOURABLE DAVID BOYLE.

LORD JUSTICE CLERK,

1811. THE RIGHT HONOURABLE DAVID BOYLE, (Appointed Lord Justice-General and Lord President of the Court of Session, in October 1841.)
1841. JOHN HOPE.

LORDS COMMISSIONERS OF JUSTICIARY,

1819. ALEXANDER MACONOCHIE, LORD MEADOWBANK.
1824. JOSHUA HENRY MACKENZIE, LORD MACKENZIE.
1829. SIR JAMES WELLWOOD MONCREIFF, BART., LORD MONCREIFF.
1830. JOHN HAY FORBES, LORD MEDWYN.
1837. HENRY COCKBURN, LORD COCKBURN.

LORD ADVOCATE,

1835. JOHN ARCHIBALD MURRAY, (Appointed a Lord of Session in April 1839.)
1839. ANDREW RUTHERFURD,—Succeeded in September 1841, by
THE RIGHT HONOURABLE SIR WILLIAM RAE, BARONET.

SOLICITOR GENERAL,

1837. ANDREW RUTHERFURD, (Appointed Lord Advocate in April 1839.)
1839. JAMES IVORY, (Appointed a Lord of Session in May 1840.)
1840. THOMAS MAITLAND,—Succeeded in September 1841, by
DUNCAN M'NEILL.

DEPUTE ADVOCATES,

1835. JOHN SHAW STEWART, (Appointed Sheriff of Stirlingshire in April 1838, Died in June 1840.)
1835. GEORGE NAPIER, (Appointed Sheriff of Peebles-shire in April 1840.)
1835. COSMO INNES, (Appointed Sheriff of Elgin and Nairn in July 1840.)
1835. ROBERT HANDYSIDE, (Appointed Sheriff of Stirlingshire in July 1840.)

1838. ARCHIBALD DAVIDSON,
1840. JAMES CRAUFURD,
1840. JOHN THOMSON GORDON,
1840. GEORGE DEAS,

} Succeeded in September 1841, by

ADAM URQUHART.
ROBERT WHIGHAM, (Appointed Sheriff of Perthshire in December 1841.)
DAVID MILNE.
MARK NAPIER.

CHARLES NEAVES, (Appointed on the removal of Mr. Whigham.)

CROWN AGENT,

1835. DAVID CLEGHORN, W.S. (Died in October 1840.)
1840. WILLIAM BELL, W.S.—Succeeded in September 1841, by JAMES TYTLER, W.S.

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ERRATA.

Page 68, line 3 from bottom, *for* "verdict of assize," *read* "judicial confession."
—— 194, —— 8 from top, *for* "thirteen" *read* "nine."

REPORTS, &c.

HIGH COURT OF JUSTICIARY.

Jan. 3
1838.

Present,

THE LORD JUSTICE-CLERK.

LORDS MACKENZIE, MONCREIFF, COCKBURN.

HER MAJESTY'S ADVOCATE.—*Lord Advocate Murray.—Sol.-Gen. Rutherfurd.—Shaw Stewart.—Handyside*

AGAINST

THOMAS HUNTER, PETER HACKET, RICHARD M'NEIL, JAMES GIBB, and WILLIAM M'LEAN.—*Robertson.—M'Neill.—A. M'Neill.—J. Anderson.—H. G. Bell.*

CONSPIRACY.—MURDER.—INDICTMENT.—WITNESS.—PROCESS.—EVIDENCE.—PROOF OF HANDWRITING.—THREATENING LETTERS.—VERDICT.—OBJECTION IN ARREST OF JUDGMENT.

1. (1.) An objection to an Indictment containing several major propositions, that each minor could not be specially referred to one of the majors, which at once reached and covered it, repelled. (2.) A conviction of a substantive crime, such as murder or fire-raising, is incompetent under a charge of conspiracy, of which an act of that nature is stated to have been one of the means. (3.) An act of murder having been charged cumulatively, as committed by one of five pannels under the instigation and directions of the rest, AS ALSO by the whole five directly—the first statement held to be a relevant charge of murder against all the pannels, and the second departed from as inconsistent with it.

2. It is no objection to the admissibility of a witness for the prosecution, that a reward has been offered by a royal proclamation to any

No. 1. Thomas Hunter and others, Jan. 3 1838.

Conspiracy, Murder, &c.

person who should give "such information and evidence as shall "lead to the discovery and conviction" of the guilty party.

3. Form of adjournment at the close of each day of a protracted trial.
4. Circumstances in which the Court doubted the competency of examining a witness as to what he had been told by a person proved to be alive, regarding the proceedings of an illegal association, of which that person was a member, and the Prosecutor, in consequence, declined to press the question.
5. In a case of conspiracy, a letter evidently relating to the business of the conspiracy, addressed to one of the pannels, and found in his house three or four days after his apprehension, although there is not sufficient proof that it was written by a co-conspirator, is an admissible article of evidence.
6. Two witnesses examined without objection, as to the account which they had received of the transaction, which was the subject of trial, from a person since deceased—not the party injured by the crime.
7. The obtaining a certain certificate having been founded on as a ground of suspicion against one pannel, and the fact of having granted it against four others—the statement made by the party on applying for such certificate, held a part of the *res gesta*, and allowed to be proved in exculpation.
8. A number of witnesses to a defence of *alibi*, who, shortly after the commission of the crime, had signed, in presence of one another, a joint certificate, and at the same time conversed together in regard to the times, places, and circumstances to which the defence referred, allowed to be examined *cum nota*, principally on the ground that there was not sufficient proof of agency to connect the pannel with the procuring of the certificate,—but a unanimous opinion expressed by the Court, that if the act of one pannel had disqualified the witnesses from giving evidence in his favour, they could not have been received in favour of the others.
9. (1.) The evidence of three engravers, that, in their opinion, a letter is in the same hand-writing as the signature to the pannel's declarations, and another writing which he acknowledged to be his, is not sufficient proof that the letter was written by him. (2.) The Jury directed to find a charge of writing and sending a threatening letter not proven, partly on the ground that the letter was proved to have been put into a different post-office from that set forth in the libel.
10. An objection founded on a contradiction in the terms of the verdict, sustained in arrest of judgment on one of the charges,—it being held that no explanation of the verdict was competent, after it had been recorded, and the Jury formally discharged.

THOMAS HUNTER, PETER HACKET, RICHARD M'NEIL, JAMES GIBB, and WILLIAM M'LEAN, all operative

cotton-spinners in Glasgow, were charged on Criminal Letters,[1] with

No 1. Thomas Hunter and others, Jan. 3 1838.

Conspiracy, Murder, &c.

"Illegal conspiracy of workmen forcibly and illegally to raise or "keep up wages, or the price of labour, by means of threats, intimida- "tion, and molestation to other workmen, and by perpetration of acts "of wilful and illegal violence against the persons or property of mas- "ters or workmen, with the illegal and felonious intent and purpose of "thereby deterring and intimidating them respectively from giving or "taking employment at the rate of wages, or on the terms which they "please.—As ALSO illegal conspiracy of workmen, forcibly and illegally "to raise or keep up wages, or the price of labour, by means of the "writing and sending of threatening letters to masters or their mana- "gers, and of the wilfully setting fire to or attempting to set fire to "the dwelling-houses, mills, or warehouses of owners, masters or their "managers, and of the forcibly invading of the dwelling-houses of work- "men, and of assaulting and murdering workmen, or by means of the "perpetration of one or more of these unlawful acts, with the illegal "and felonious intent and purpose of thereby deterring and intimidat- "ing them respectively from giving or taking employment at the rate "of wages, or on the terms which they please; and when such threat- "ening letters are written and sent to such masters or their managers, "and fire is so set, or attempted to be set, to dwelling houses, mills, or "warehouses of owners, masters or their managers, and the dwelling- "houses of workmen are invaded, and themselves assaulted and "murdered, or one or more of these unlawful acts are perpetrated, "in pursuance of the said object and purpose of such illegal con- "spiracy.—As ALSO murder, more particularly the wickedly, ma- "liciously, and feloniously assassinating a workman, with the wicked "and felonious intent thereby of deterring other workmen from conti- "nuing in or taking employment at such rate of wages, or on such terms "as they may choose," with a separate charge against M'Neil of writing and sending a threatening letter.

The Criminal Letters narrated the formation, "several "years ago, the precise time and place being to the pro-

---

[1] See Vol. I. of these Reports, p. 550, for the Indictment with which the pannels were originally served, and the debate which took place on the relevancy. The unprecedented length of this trial, and the great interest and importance which attached to it, have led to its publication in a separate volume, containing the whole evidence, oral and documentary, and the opinions of the Judges, and speeches of counsel carefully revised. In the text, accordingly, nothing more has been attempted, than to report, as shortly as possible, the points of law which arose in the course of the proceedings.

No. 1. Thomas Hunter and others, Jan. 3 1838.

Conspiracy, Murder, &c.

"secutor unknown," by the operative cotton-spinners of Glasgow, and the neighbourhood, of an illegal association, the proceedings of which were described, and the pannels stated to have been members, and all of them, except M'Lean, office-bearers. They were then charged (1,) with having, in April 1837, conspired, along with others, to use intimidation and violence against the persons of operatives, and for that purpose appointed a guard committee, through the agency of which (2 and 3,) certain acts of violence were committed; (4,) with having, on the 23d of May, conspired to set fire to a cotton-mill, and hired persons to do so, by whom the attempt was actually made; (5,) with having, on the 14th of June, conspired to use intimidation and violence against the persons and property, both of masters and workmen, and, for that purpose, appointed a secret select committee, by whom, and by the pannels, various acts of violence were committed or instigated: AND, MORE PARTICULARLY, (6,) an assault made on the 15th of June, on David Gray and Edward Kean, cotton-spinners at the Adelphi works: LIKEAS, (7,) a threatening letter written and sent on the 20th of June, and, (8,) another on the 3d of July to Mr. Arthur, manager of these works: LIKEAS, (9,) a similar letter written and sent on the 24th of July, to Mr. Bryson, manager of Mitchell and Norris's mill: LIKEAS, (10,) the house of Mrs. Divan invaded, and Thomas Donaghey assaulted, on the 30th of June: LIKEAS, (11,) the dwelling-house of a master spinner attempted to be burned on the 11th of July: LIKEAS, (12,) John Smith, cotton-spinner, murdered on the 22d of July, by the pannel William M'Lean, hired and instigated by the other pannels and the secret select committee.

The writing and sending one of the threatening letters to Mr. Arthur, was then charged separately against M'Neil, and all the five pannels were charged directly with the murder of Smith.

M'NEILL, for the pannels, objected to the relevancy of the Criminal Letters: (1.) Of the two major propositions,

No. 1. Thomas Hunter and others, Jan. 3 1838.

Conspiracy, Murder, &c.

the one charges a Conspiracy to raise or keep up the rate of wages by doing certain things, but wholly unconnected with any statement that the things were done; the other sets forth a Conspiracy to raise wages by means of doing certain specific things, and where these things have been actually done. Now, it is not clear to which of these two majors, any one of the acts charged in the minor proposition is specially referable. Each major proposition must have a minor that can be referred to it, and that it reaches and covers. But, although all the minor propositions may be covered by the second major, there is no minor which exhausts the first major, and, at the same time, is covered by it. (2.) The second major proposition charges a Conspiracy to keep up the rate of wages, by means of acts of fire-raising, invading dwelling-houses, assault, and murder, and sets forth that these acts were done. But these are all substantive crimes, of which the pannel cannot be convicted under a charge of conspiracy. (3.) The murder of Smith is charged as having been committed in two different ways: 1. By the pannel M'Lean, hired and instigated by a certain secret select committee, and the other four pannels: AS ALSO, 2, by the five pannels themselves, without concert with any committee. These statements are not consistent with one another, and one or other of them must be struck out of the Indictment.

The first of these objections was repelled. In regard to the second, the Solicitor-General, for the prosecution, admitted that a conviction of Murder, Fire-raising, &c. as substantive crimes, could not take place under the charge of Conspiracy. After some discussion on the third objection, the Court expressed a unanimous opinion, that the first statement of the mode in which the death of Smith was accomplished, contained a relevant charge against all the pannels, not only of conspiracy, but also of murder.

The Lord Advocate accordingly departed from the second charge of murder.

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The pannels pleaded not guilty, and a proof was led.

2. JAMES MOAT, cotton-spinner, having been called as a witness,—

J. ANDERSON, for the pannels, objected to his admissibility, in so far as he was adduced to prove the charge of murder, on the ground of his having received a promise of reward for giving his evidence. That offer was contained in a proclamation in Her Majesty's name, offering a reward of L.100, to any person who should give "such in-"formation *and evidence* as shall lead to the discovery "*and conviction* of the murderer" of Smith. (Case of Coulton, 4th and 8th December 1738. Hume, vol. ii. p. 364.)

The SOLICITOR-GENERAL, in reply, quoted Alison, vol. ii. p. 494, and Roscoe's Digest of the Law of Evidence in Criminal Cases, p. 104.

After some farther discussion, the Court repelled the objection.

3. At half past seven o'clock it was suggested by the Lord Advocate, that the great number of witnesses to be examined on both sides, rendering it perfectly certain that this trial could not be brought to a conclusion in the course of the present sederunt, it was desirable for all parties, and especially necessary in justice to the pannels, that the Court and Jury should not continue the investigation of this most important and complicated case, in a state of exhaustion, or without being able to give it their vigorous and unremitting attention. He therefore hoped it would meet with the approbation of the pannels and their counsel, to move the Court now for an adjournment of the proceedings till to-morrow morning, in anticipation of which, convenient and suitable accommodation had been provided for the Jury.

The Counsel for the pannels, as well as the pannels themselves, consented to the proposed adjournment.

"The Lords having considered what was stated, and

"particularly the consent before recorded, in respect "thereof, and of the necessity of the case, continue the "diet against the pannels till to-morrow morning at half-"past nine o'clock, and ordain the hail parties, pannels, "witnesses, assizers, and all concerned, then to attend "under pain of law; the pannels being in the meantime "carried to and detained in the Tolbooth of Edinburgh, "and the hail fifteen jurors now in the box being hereby "ordained to repair, under the custody of John Amory "and William John Monro, two of the macers of Court, to "M'Queen's hotel, Prince's Street, Edinburgh, the place "of accommodation provided for them, to remain under "the custody of the said macers, till brought here in the "hour of cause above-mentioned, and being strictly se-"cluded during the period of adjournment, from all "communication with any person whatever, on the sub-"ject of this trial, the said macers always having neces-"sary access to them, for the purpose of seeing to their "proper accommodation, and the clerk of Court having "access to, and liberty to communicate with them, in re-"lation to their private or personal affairs, if this shall "become necessary."

"Thereafter, and before the adjournment actually took "place, the said John Amory and William John Monro, "and Charles Neaves, depute-clerk of Court, had admi-'nistered to them respectively the oath *de fideli*, to "have no communication themselves, and to admit no "communication by others, with the Jury, on the subject "of this trial, and to be otherwise faithful in the pre-"mises."

The LORD JUSTICE-CLERK stated to the Jury, that he had no doubt they would agree with him, as to the propriety of their having no conversation among themselves on the subject of the trial.[1]

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[1] The Court adjourned on the six following evenings, under similar provisions. At the close of the fourth day, (Saturday January 6th),

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4. A witness, James Murdoch, having stated, in the course of his examination relative to the general character of the association, that he was present, along with five others, in the year 1820, when one M'Quarrie was shot at and wounded by Stephen Campbell, a member of the association, whom he stated to be now living in Glasgow, and that he had himself seen, in the schedules of expenditure, which were circulated among the members of the association, an entry which he believed had reference to this matter,—

HANDYSIDE, for the prosecution, proposed to ask the witness, whether Campbell told him that he received a reward of L.15 from the association.

ROBERTSON, for the pannels, objected,—The question is incompetent, on the grounds that Campbell himself is proved to be alive, and ought, therefore, to have been brought, and that the conversation alleged to have passed between him and the witness took place when the

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the adjournment was till Monday. "Further, on the application of "the Jury, and in consideration of the danger to their health from the "close and severe confinement and fatigue which they have undergone "during this and the preceding three days, and having in view the "additional confinement and fatigue to which they are still to be sub-"jected, till this trial terminate, the Lords, with consent of the prose-"cutor, the pannels, and their counsel, allow them to be taken out of "the hotel, and for the purpose of hearing divine service in the fore-"noon, carried in proper conveyances to the seats usually appropriated "for the Judges of the Supreme Courts, in the High Church of this "city; as also to be taken out as aforesaid for the purpose of an airing "in the neighbourhood of Edinburgh, at any time to-morrow between "the hours of eleven o'clock forenoon and three o'clock afternoon, they "always being accompanied by and remaining in charge of one or "more of the said macers, and being strictly secluded from any com-"munication with any person whatever, on the subject of this trial." The adjournment on the fifth, sixth, and seventh days proceeded on the motion of the counsel for the pannels, and took place under the express understanding, that the period of adjournment should not be reckoned in the running of the letters of intimation, which would, in the natural course, have expired on the night of Thursday the 11th of January.

pannels were not present, and relates to a matter in regard to which they had no warning.

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The LORD-ADVOCATE, for the prosecution, answered —The prosecutor is, no doubt, bound to bring the best evidence of which the case admits. But it would have been contrary to every principle of the law of evidence, to have brought forward the man who committed this crime as a witness against himself, and Campbell could not have been made a witness, without being assured of his own safety.

M'NEILL, for the pannels, replied.—If Campbell were in the witness box, and refused to speak, then the Lord Advocate would have put himself in a position to resort to secondary evidence; but he is not now in a condition to do so.

The LORD JUSTICE-CLERK and LORD MACKENZIE were of opinion that the question was incompetent. LORDS MONCREIFF and COCKBURN held, that though it would have been so in an ordinary case, yet, that considering the circumstances in which it was proposed to be put, and considering also that the charge under trial was one of conspiracy, in which the acts and deeds, and verbal declarations of co-conspirators are always admissible articles of evidence, (Roscoe's Digest, p. 324), the question might be allowed.

In consequence of the difference of opinion on the Bench, The LORD-ADVOCATE declined to press the question; but, at a subsequent period of the trial, the LORD JUSTICE-CLERK intimated, that if the point had been more fully discussed, less doubt would probably have existed on the part of some of the Court in regard to the competency of the question.

5. A letter signed "Patrick M'Gowan," dated Manchester, July 10, 1837, and addressed to the pannel Hacket, at the tavern which was the place of meeting of the committee of the association, was tendered in evidence. It was proved to have been found in an open drawer in Hacket's house, within four or five days after

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the apprehension of the pannels, and Hacket, in his declaration, stated "that he cannot remember whether he "received said letter or not." A Patrick M'Gowan was mentioned in the Indictment as a conspirator, and a person of that name had been proved to have taken some part in the illegal proceedings of the association. There was also, in a letter addressed by the pannel M'Neil to Hacket at Manchester, in May 1837, a reference to a communication from "*Patrick*," and in the postscript these words, "Best regards to *Mr. M'Gowan*."

ROBERTSON, for the pannels, objected to the competency of producing the letter, that there was no evidence either that it was the genuine letter of M'Gowan, or that M'Gowan was a conspirator. Neither is there sufficient proof of its having ever been received by the pannel Hacket. (Cases of Watson and Hardy, Starkie on Evidence, vol. ii. pp. 234, 235; R. *v.* Sidney, and R. *v.* Lord Lovat; Archbold's Summary of the Law of Pleading and Evidence, 6th edition, p. 414.)

The LORD-ADVOCATE and SHAW STEWART, for the prosecution, answered,—There is sufficient evidence that this letter was in the possession of the pannel, Hacket, the Treasurer of the association. The Court must be satisfied on looking at it, that it relates to the subject of the conspiracy, and it must therefore be competent to produce it—not as a declaration of guilt by a co-conspirator, but as a document tending to prove the criminal character of the association, (Hume, vol. ii. p. 396; Alison, vol. ii. p. 612; Burnett, pp. 486, 487,) just as in the case of Hardy, a letter to the pursuer from a society at Sheffield, signed "William Broomhead, secretary," and which had been found in the possession of Thelwall a conspirator not under trial, was allowed to be read, without any proof that there was such a person as William Broomhead, or that there was a Sheffield society in existence. (Mr. Gurney's edition of Hardy's Trial, vol. i. p. 412.)

M'NEILL having been heard in reply,

The Court unanimously held, that as the letter in question clearly related to the business of the association, and was proved to have been in the possession of the pannel Hacket, it was an admissible article of evidence, not as the letter of any particular individual, but simply as an article touching the common cause, and traced into the hands of a prisoner. The letter was accordingly read to the Jury.

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6. Several witnesses who were in the immediate vicinity at the time of the murder of Smith, were examined for the prosecution, and William Smith was adduced in reference to the general character of the association, and some circumstances showing the apprehension with which the "nobs" or new hands viewed the turn-out cotton-spinners.

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ROBERTSON, for the pannels, cross-examined this witness at considerable length, as to certain statements concerning the murder of Smith, which he related to have been made to him by a neighbour named Mrs. Macdonald, who was since dead, and who had herself seen it committed. The wife of the witness was afterwards examined in exculpation, to the same effect, without any objection being offered, on the part either of the Court, or of the counsel for the prosecution.[1]

7. One of the circumstances founded on against the pannels was the fact of M'Lean having procured, shortly before the murder was committed, a certificate to the

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[1] This point is noticed, because the question which it involves is stated by Mr. Alison (vol. ii. p. 515.) as one not then settled. After laying it down, that "when it is once proved that a witness injured by "any crime is dead, it becomes competent to prove by the evidence of "third parties who have heard what he said in regard to the subject "of the trial, the import of his conversation or declaration," and referring to the case of M'Coul or Moffat, June 12, 1820, where this was held in regard to a statement made by one Likely, who was since dead, he adds, "that party however was the cashier of the bank broken into "on that occasion, and therefore *it is not yet settled* whether the same "will hold in the ordinary case of a witness who has died *without* "*being a sufferer on the occasion.*"

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effect, that he was a clear member of the association, and had always done his duty, which certificate was signed by the other four pannels. Adam Sideserff, an exculpatory witness, having stated that he recollected M'Lean applying for it—

ROBERTSON, for the pannels, proposed to ask him what M'Lean said.

The SOLICITOR-GENERAL, for the prosecution, objected, that a statement made by a party may be evidence against him, but can never be evidence in his favour, unless it is a necessary part of the *res gesta*, which is not the case here.

M'NEILL, for the pannels, replied.—The *res gesta* runs over the whole history of the association. The certificate is produced as evidence, not against M'Lean alone, but also against the four other pannels. The fact of their having granted it is represented as a mysterious and suspicious circumstance, and therefore leading to the inference of guilt. But if it is proved that M'Lean, when he applied for it, did so upon the ground that he was going abroad, where, according to the evidence, it might be useful, the mystery will be cleared up.

The Court, looking to the particular circumstances in which the question was proposed, and viewing it as a part of the *res gesta*, allowed it to be put, it being understood that they did not depart from the general rule, that nothing said by a pannel can be evidence either for him or for the other pannels.

8. The defence for the pannel M'Lean against the charge of murder was a plea of *alibi*. Andrew White having been called as a witness in support of this plea, admitted in his examination *in initialibus*, that thirteen or fourteen days after the night on which Smith was murdered, he and four others had, at the request of one Thomas Loag, signed a certificate "to satisfy M'Lean's "friends and acquaintances that they were with him that "night till one o'clock, and after it." They all signed it together, and at the time of doing so, conversed as to the

different places where they were in the course of the night, and the particular hours at which they had left each. Loag had previously been examined for the prosecution, and had stated that he acted by desire of M'Lean's father. The certificate was found, after M'Lean's apprehension, in his father's house, and was libelled on and produced.

The SOLICITOR-GENERAL, for the prosecution, objected to the admissibility of any of the witnesses who had signed the certificate.

M'NEILL, for the pannels, answered.—There is no precedent for this objection, even as regards the pannel M'Lean. But the case, in regard to the other pannels, is much stronger. They are not alleged to have been concerned in getting up this certificate, and they cannot be precluded from calling these witnesses, merely because M'Lean's father, anxious to assert his son's innocence, obtained from these parties joint certificates instead of separate ones. M'Lean's *alibi* is a good defence *for them*. Though M'Lean were to stand up here, and confess his guilt, this could not prevent the other pannels from proving their own case by their own witness. Nothing he can say or do, much less his father, can in any way affect them.

The Court, with some hesitation, and without pronouncing a deliberate opinion as to the strict rule of law upon the subject, held, that considering the circumstances of the case, and looking especially to the fact that there was no proof of direct agency, to connect the person at whose instance the certificate was prepared with the pannel M'Lean, the evidence of the witnesses objected to should be received *cum nota*, but expressed a unanimous opinion, that if they had been found inadmissible for M'Lean, they could not have been examined for the other pannels.

9. The separate charge against the pannel M'Neil of sending a threatening letter was, that " on the 20th or " 22d of June 1837, &c. and within an apartment, &c. or " elsewhere within the city of Glasgow, or in the vicinity " thereof, to the prosecutor unknown," he did wickedly and maliciously write the letter, " and the said letter, of

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"the tenor and import above libelled, and addressed as "aforesaid, the said Richard M'Neil did wickedly and "maliciously *put into the Post-office at Glasgow*, or "cause or procure to be put into the said post-office, &c. "and the said letter was duly delivered to and received "by Alexander Arthur, &c."

Three engravers, who were examined for the prosecution, gave it as their opinion, that the threatening letter libelled on was in the same hand-writing as the signature to the pannel M'Neil's declarations, and another writing which he acknowledged to be his. No person acquainted with M'Neil's hand-writing was examined, nor any person who had ever seen him write. The letter was shown to him when he was apprehended, and he positively denied that it was his hand-writing. It was proved on the part of the pannel, by the evidence of the postmaster at Neilston, and a clerk in the Glasgow post-office, that from the post-mark on the letter in question, it must have been put into the post-office at Neilston, which is within the Glasgow penny post delivery, but in the county of Renfrew, and nine miles distant from Glasgow.

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In these circumstances, The LORD JUSTICE-CLERK told the Jury.—You will consider well before you find the letter to Mr. Arthur to have been written by the pannel M'Neil, but I may fairly tell you, that to me and my brethren on the bench, it appears that the evidence on this point is deficient.[1] Another objection to this charge is, that the Indictment states the letter to have been put into the post-office at Glasgow, whereas it turns out that it was put in at Neilston. On the whole, it will be your safest course to find, that the charge against M'Neil of writing and sending threatening letters is not proved.

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10. The Jury, by a majority, found the first, second, third, and tenth charges of the libel proven against all the pannels as libelled, and unanimously found the other charges of the libel not proven.

This verdict having been recorded, The LORD JUSTICE-

[1] Authorities quoted for the pannel on this point, Hume, vol. ii. p. 295; Burnett, p. 503; Philipps on Evidence, 7th edition, vol. i. p. 490.

CLERK discharged the Jury, and stated to them, that considering the severe duty which they had had to discharge, and the length of time they had been employed in this case, the Court had resolved to enter on the books of adjournal a resolution to the effect, that they should be excused from serving on juries for three years, and to recommend to the Sheriffs of the district to extend to them a similar indulgence.

M'NEILL, for the pannels, thought it right to bring under the notice of the Court and the Jury a contradiction in the terms of the verdict as at present worded. The fifth charge contained a general statement of the various acts of violence said to have been done through the agency of the secret select committee appointed on the 14th of June, and the seven following charges, including the 10th, contained merely a particularization of the individual acts. Since, therefore, the general charge had been found not proven, no single particularization of that charge could be proven.

The LORD JUSTICE-CLERK.—The Jury have been discharged according to the forms of the Court. We cannot now ask them to go back upon their verdict. Before the words were finally recorded, it would have been quite right to have asked them for any explanation which they might have thought proper to give. But that is quite incompetent now.

The LORD-ADVOCATE having moved for sentence,—M'NEILL, for the pannels, repeated his statement, as an objection in arrest of judgment on the tenth charge.

The SOLICITOR-GENERAL, for the prosecution, answered,—The objection cannot be carried farther than this, that that part of the tenth charge, which states the pannels to have been parties to the appointment of the secret select committee, is not to be taken into consideration.

ROBERTSON, for the pannels, having replied,

The Court found, that looking to the structure of the Indictment, in which the charges after the fifth were in-

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troduced by the words "more particularly," followed at the commencement of each separate charge by the word "likeas,"—no judgment could pass on that part of the verdict relating to the tenth charge.

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In respect of the foregoing verdict of assize, the pannels were sentenced to be transported beyond seas, for the period of seven years.

GLASGOW CIRCUIT.

Winter 1838.

JUDGES.

Jan. 10 1838.

LORDS MEDWYN AND COCKBURN.

HER MAJESTY'S ADVOCATE.—*Handyside*

AGAINST

JAMES WILSON.—*John Murray, Jun.*

CULPABLE HOMICIDE.—A pannel having assaulted a person, who was immediately conveyed to an hospital, where he contracted erysipelas, and died, acquitted of Culpable Homicide, and convicted only of the alternative charge of Assault.

No. 2. James Wilson.

JAMES WILSON and ROBERT WILSON were charged alternatively with Culpable Homicide, or Assault to the injury of the person and danger of life;

Culpable Homicide.

IN SO FAR AS, on the 8th of March 1837, on or near to the Dalmarnock Road, in the barony parish of Glasgow and shire of Lanark, and at or near that part thereof which is opposite, or nearly opposite, to the house occupied by William Chalmers, change-keeper, the said James Wilson and Robert Wilson did wickedly and feloniously attack and assault James Smith and Donald Pollock, privates in the 79th regiment of foot, then stationed in the barracks, Gallowgate street of Glasgow: And the said Donald Pollock having taken refuge in the house of the said William Chalmers: And the said James Smith having

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Culpable Homicide.

proceeded along the road towards Glasgow, the said James Wilson and Robert Wilson did, both and each, or one or other of them, follow after the said James Smith; and having overtaken him when opposite or near to the house or shop in Anderson's Land, Dalmarnock road aforesaid, occupied by Joseph Hamilton, baker, did, both and each, or one or other of them, strike the said James Smith a violent blow on the belly, which felled him to the ground; and when lying on the ground, did repeatedly strike him and kick him on various parts of his body, and did pull his bayonet out of its scabbard, and did strike him therewith several severe blows on the head; and in consequence of the injuries so received from them, or one or other of them, the said James Smith was, on the same night, sent as a patient into the hospital of the said barracks, where he continued to languish until on or about the 26th day of the said month of March, when he died from the injuries received from them, or one or other of them, as aforesaid, and was thus culpably killed by them, the said James Wilson and Robert Wilson, or one or other of them: OR AT LEAST, the said James Smith, in consequence of the injuries so suffered from them, or one or other of them, contracted, or was infected with erysipelas of the head, which attacked him on or about the 13th day of the said month of March, and of which disease he died on or about the 26th day of that month, and was thus culpably bereaved of life by them the said James Wilson and Robert Wilson, or one or other of them: OR OTHERWISE, time and place above libelled, the said James Wilson and Robert Wilson did, both and each, or one or other of them, wickedly and feloniously attack and assault the said James Smith and Donald Pollock, or one or other of them, in manner above libelled, to the great effusion of the blood of the said James Smith, and to the injury of his person, and to the danger of his life.

The diet having been called against Robert Wilson, and he having failed to appear, sentence of fugitation was pronounced against him.

The pannel, James Wilson, pleaded not guilty.

A proof was led, from which it appeared, that immediately after the assault, Smith was conveyed to the hospital of the barracks, where the wounds on his head were examined, and found not to be of a dangerous nature. On the fifth day, erysipelas began to make its appearance on the wounds, and, having spread on the head, proved fatal in thirteen days. It appeared, that at the time he was taken to the hospital, there was a mild case of erysipelas in the same ward—in a bed at the distance of twenty feet from that occupied by the deceased. The

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medical witnesses deponed, that, in their opinion, the patient did not contract the disease through infection—though it was possible that he might have done so.

Culpable Homicide.

HANDYSIDE, for the prosecution, argued, that a case of culpable homicide had been established against the pannel.

MURRAY, for the pannel, answered, that he could be found guilty of the assault only. (Cases of Christian Paterson, 1823; and Campbell, 1819. Alison, vol. i. p. 147.)

LORD COCKBURN charged the Jury.—It is argued by the public prosecutor, that but for the wounds inflicted by the pannel, the sufferer never would have died, and they are, therefore, not only the remote, but, properly speaking, the real and only cause of his death. For the pannel, on the other hand, it is argued, that the wounds cannot be blamed for the effects of a disease, which is not the natural consequence of them, and but for which they would have proved comparatively harmless. Now, this latter doctrine is not to be taken without some limitation. Suppose a man to die of apoplexy, but that apoplexy to have been produced by a blow. It will not, surely, do for the prisoner, in that case, to say, I gave you a blow, but I did not give you apoplexy. He must stand the peril of the consequences of his act. Death seldom follows directly from a blow, or even a wound. Some supervening disease is generally the immediate cause. I remember the case of the gamekeeper of a person of high rank, who, by means of a spring gun, shot a poacher. The wound produced lock-jaw, which caused death. An attempt was made in that case, as in the present, to represent the lock-jaw as unconnected with the injury inflicted—which, however, very properly, proved unsuccessful.[1] For the rule is, that provided the disease, from

[1] Case of James Craw, 26th June 1826, and 6th and 8th June 1827 (Syme, pp. 188, 210), in which it was decided that it is murder to set a spring gun in a preserve, if death thereby ensue to a poacher. The case was not tried upon the facts, but the plea referred to by his Lordship (who was one of the counsel for the pannel) was announced as to constitute the defence.

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which death follows, be not altogether new, but a natural consequence of the injury, the law holds that injury to be the cause of the death. In the case of Christian Paterson, to which reference has been made, the circumstances were entirely different. The woman there, within a few days after receiving the injury, had drank a quantity of whisky, which produced erysipelas, of which she died. In fact she died of whisky, and not of any proper result of the injury. In the case of Campbell I was counsel for the prisoner. The person who had been wounded was taken to the Infirmary, where erysipelas was absolutely raging. One of the medical witnesses stated that the disease was so prevalent there, that any stranger entering the Infirmary would have been almost certain to take it. Nay, it was proved that the tendency to infection was greater without the wounds than with them, as the loss of blood would operate as a protection. Under these circumstances the Jury justly held that the wounds were not the cause of the erysipelas. You must apply this principle to the present case. If the wound caused the disease, the pannel must be found guilty of culpable homicide. If it had no effect in producing it—the verdict cannot go that length. Now, the medical witnesses tell us that the disease was not contracted by infection, and their report describes the wounds as the primary cause of death. Before you can acquit the pannel of the more serious charge standing against him, you must be satisfied that the disease was an entirely new disease—not produced by the wounds, but by infection, or some other external cause. The application of this principle will require your utmost caution. And you are bound to give the pannel the benefit of any reasonable doubt which you may entertain on this point; and if you have any such doubt, your verdict can only be one of guilty of assault.

The Jury, by a majority of one, found the charge of culpable homicide not proven, but found, unanimously, the charge of assault proven as libelled.

In respect of which verdict of Assize, the pannel was

No. 2. James Wilson, Glasgow, Jan. 10 1838.

sentenced to be transported beyond seas, for the period of seven years.

Culpable Homicide.

Jan. 12 1838.

HER MAJESTY'S ADVOCATE.—*Handyside*

AGAINST

JOHN M'CABE, JAMES MILLIGAN, MICHAEL GOODWIN, and PATRICK DIVAN.—*H. G. Bell.*

RIOTING AND BREACH OF THE PEACE.—INDICTMENT.—WITNESS.—

1. An objection to an indictment for rioting and breach of the peace, that the *species facti* libelled amounted to the crime of mobbing, repelled.
2. An objection to the admissibility of a witness, founded on a statement that he was a different person from that specified in the list annexed to the indictment, sustained, after the Jury was sworn.
3. A similar objection, founded on an alleged error in regard to the county in which the witness's residence was situated, repelled.

No. 3. John M'Cabe and others, Glasgow.

JOHN M'CABE, JAMES MILLIGAN, MICHAEL GOODWIN, and PATRICK DIVAN, were charged with Rioting and Breach of the Peace, as also Assault to the effusion of blood and serious injury of the person.

Rioting and Breach of the Peace.

IN SO FAR AS, on the 19th of June 1837, and at or near a piece of ground near to Govan coalworks, belonging to William Dixon, Esq., and which piece of ground is situated in the parish of Govan, and county of Lanark, or otherwise in that part of the parish of Govan, which is within the county of Renfrew, a mob, or great number of disorderly and evil disposed persons, who were armed, or at least a portion of them, with large sticks or bludgeons, and having fought together, in breach of the public peace, did riotously and tumultuously assemble together, to the disturbance of the public peace, and to the terror and alarm of the lieges, did thereafter proceed in a violent and outrageous manner to attack and assault peaceably disposed persons, who happened to be present at and to witness the lawless proceedings of the said mob, and the said mob did strike and beat with their large sticks or bludgeons, and did kick with their feet, a number of the said peaceably disposed persons, and did otherwise maltreat and abuse them, to the effusion of their blood, and serious injury of their persons: MORE

No. 3. John M'Cabe and others, Glasgow, Jan. 12 1838.

Rioting and Breach of the Peace.

PARTICULARLY, time and place aforesaid, John M'Gavick, collier at Govan colliery aforesaid, and now or lately residing with Neil M'Camrage, shoemaker, Main street, Gorbals, in or near Glasgow, was wickedly and feloniously assaulted by the said mob, and was repeatedly struck with a large stick or bludgeon several severe blows upon the head, and other parts of his body, and was knocked down to the ground, and kicked, and otherwise abused and maltreated, so that he was rendered insensible, and his head cut in different places, and his person otherwise severely injured, and to the effusion of his blood: And William Broadly, collier at the Govan colliery aforesaid, and now or lately residing at Newry-row, or Urie's-row there, was wickedly and feloniously assaulted by the said mob, and was severely struck with a large stick or bludgeon upon the forehead, which knocked him down to the ground, and when on the ground he was kicked severely under the right eye, and otherwise abused and maltreated, so that he was rendered insensible, and his face cut, and his person otherwise severely injured, and to the effusion of his blood: And the said John M'Cabe, Hugh M'Kenna, James Milligan, Michael Goodwin, and Patrick Divan, did, all and each, or one or more of them, form part of the said mob or great number of disorderly and evil disposed persons, by taking an active part therein, and by exciting, encouraging, assisting, aiding and abetting them in their unlawful, riotous, and tumultuous proceedings and assaults above libelled: As ALSO, the said John M'Cabe, Hugh M'Kenna, James Milligan, Michael Goodwin, and Patrick Divan, did, all and each, or one or more of them, time and place above libelled, wickedly and feloniously attack and assault the said John M'Gavick and William Broadly, or one or other of them, in manner above libelled.

1. H. G. BELL, for the pannels, objected to the relevancy of the Indictment, that the minor proposition sets forth the assemblage of a mob, and therefore the *species facti* amounts to the crime of Mobbing, which is not charged in the major proposition.

HANDYSIDE, for the prosecution, answered,—If the statement in the minor proposition amounted to a different crime from that charged in the major, the discrepancy would be fatal. But the *species facti* set forth corresponds exactly with the charges of Rioting and Breach of the peace.

LORD MEDWYN.—The Indictment might have been more accurately expressed, but as the crime of Rioting may be committed by a crowd or number of persons, the pannels are properly charged with Rioting and Breach of

No. 4. M'Cartney v. Guthrie, Jan. 19 1838.

annexed to the act, as it neither specified the crime charged, nor enumerated the number of pages of which the libel consisted. (4.) That the theft was not charged as having been committed "wickedly and feloniously."

Susp. and Lib.

The Court refused the bill, on the ground that in framing complaints before the Justices, the same accuracy is not required as in Indictments before the Court of Justiciary, and that the forms of service and execution under the act 9th Geo. IV. c. 29, do not apply to Justice of Peace Courts; but, under the whole circumstances of the case, restricted the punishment to imprisonment for six weeks.

JOHN M'CRAKEN, S.S.C.—WILLIAM NAPIER, W. S. *Agents.*

Jan. 22 1838.

Present,

LORDS MONCREIFF, MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Rutherfurd—Innes*

AGAINST

DAVID FIELD—*B. R. Bell.*

THEFT.—The appropriation by a clerk, of a sum of money delivered to him, with instructions to pay it to the collector of excise, for a wine license for his master, is theft, not breach of trust.

No. 5. David Field.

DAVID FIELD was charged alternatively with Breach of trust and Embezzlement, or Theft,

Theft.

IN SO FAR AS, on the 19th of June 1837, the said David Field being then a clerk in the employment of William Dawson, colour-manufacturer, Leith, and George Aked, principal clerk to the said William Dawson, having, on behalf of the said William Dawson, entrusted and delivered to him the sum of L.2. 10s. sterling, with instructions to pay the same to the collector of excise in Edinburgh for a certain wine license for the said William Dawson, the said David Field did, time above libelled, within the counting-room or office situated in Elbe Street, Leith, occupied by the said William Dawson, or at some other place to the prosecutor unknown, wickedly and feloniously, and in breach of the

trust reposed in him, embezzle and appropriate to his own uses and purposes the foresaid sum of L.2. 10s. sterling, the property or in the lawful possession of the said William Dawson; OR OTHERWISE, time and place above libelled, the said David Field did, wickedly and feloniously steal, and theftuously away take the sum of L.2. 10s. sterling, the property or in the lawful possession of the said William Dawson.

No. 5. David Field, Jan. 22 1838.

Theft.

The Court found, that the *species facti* libelled in this charge amounted to the crime of Theft, and the statement of it as a case of Breach of trust and Embezzlement was, on the motion of the Solicitor-General, struck out of the Indictment.

The pannel pleaded guilty to this and a variety of other charges.

In respect of which judicial confession, he was sentenced to be transported beyond seas, for the period of fourteen years.

Present,

Jan. 29 1838.

THE LORD JUSTICE-GENERAL,

LORDS MEADOWBANK, MACKENZIE, MONCREIFF.

HER MAJESTY'S ADVOCATE—*Shaw Stewart—Innes*

AGAINST

JAMES FEGEN—*Pattison.*

ROBBERY.—A pannel having obtained possession of a watch by a sudden snatch which broke the guard chain, and the party assaulted having at the same moment fallen, either from being tripped, or accidentally,—held that there was a sufficient amount of violence to constitute the crime of robbery.

JAMES FEGEN *alias* JAMES BRANNAN was charged with Robbery,

No. 6. James Fegen.

IN SO FAR AS, late on the night of the 30th, or early on the morning of the 31st of August 1837, he did, in or near the Nethergate Street of

Robbery.

No. 6. James Fegen, Jan. 29 1838.

Robbery.

Dundee, wickedly and feloniously attack and assault Harry Howey, &c. and did forcibly throw him down upon the ground, and did then and there wickedly and feloniously, and by force and violence, take from his pocket or person, and did rob him of a silver watch, the property or in the lawful possession of the said Harry Howey;

with an alternative charge of aggravated Theft.

The pannel pleaded not guilty.

From the evidence it appeared, that he had come up to Mr. Howey, seized his watch chain, and pulled the watch out of his pocket. Mr. Howey fell, whether accidentally, or from being tripped, he could not say; but he stated, that he would not have fallen, if he had not been laid hold of. The guard chain attached to his watch was broken by a second tug, while he was falling. He fell on his knee, and was very slightly hurt. The watch was gone in a moment, and he had no time to resist.

The Court unanimously held, that the degree of violence proved was sufficient to establish the charge of Robbery, of which the Jury, under the direction of the Lord-Justice-General, found the pannel guilty.

In respect of which verdict of Assize, he was sentenced to be transported beyond seas, for the period of fourteen years.

Feb. 19 1838.

Present,

THE LORD JUSTICE-CLERK,

LORDS MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Rutherfurd—Innes*

AGAINST

JOHN LAIRD and CAUTIONER—*H. G. Bell.*

CITATION—DOMICILE—MANDATE—CAUTIONER.—1. An objection having been taken to the citation of a party, that he had lost his do-

micile at the place where the copy of the libel was left for him, and a proof having been led, which raised a presumption that he was furth of the kingdom,—held that appearance could not be made for him without a mandate, and sentence of fugitation accordingly passed.

2. Question,—whether the motion for forfeiture of the bail-bond could be insisted in under these circumstances.

No. 7. John Laird, Feb. 19 1838.

JOHN LAIRD, designed as "now or lately residing in Bernard Street, Leith," was charged with Breach of trust and Embezzlement, but failed to appear.

Breach of Trust.

The SOLICITOR-GENERAL moved for sentence of fugitation, and forfeiture of the bail-bond.

H. G. BELL objected, that Laird had not been duly cited. The copy of the libel had been left at his former domicile at Leith, but Laird having left Leith considerably upwards of forty days previous, had lost his domicile there, and the citation on the ordinary short *inducie* was therefore inept. (Act of Sederunt 14th December 1805, § 1.)

A proof having been led of the facts averred,

The SOLICITOR-GENERAL argued.—The evidence does not establish the loss of domicile averred. If to be taken at all, it raises a presumption that Laird is furth of the kingdom, and appearance cannot, therefore, be made for him without a mandate.

H. G. BELL answered,—The averment made is not that Laird is furth of the kingdom, but merely that he had no domicile at Leith, at the time of serving the libel. Appearance must at all events be competent for the cautioner in the bail bond, the forfeiture of which has been moved for.

The Court were of opinion, that no appearance could be made for Laird, without production of a mandate, and accordingly pronounced against him sentence of fugitation.

The SOLICITOR-GENERAL declined to insist at present in the motion for forfeiture of the bail bond.

March 12
1838.

Present,

THE LORD JUSTICE-GENERAL.—THE LORD JUSTICE-CLERK.

LORDS MEADOWBANK, MACKENZIE, MONCREIFF, COCKBURN.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Rutherfurd—Innes*

AGAINST

JOHN SMITH—*Logan.*

THEFT.—The appropriation by a pannel of articles found on the high-way, the owner of which is well known to him, is theft.

No. 8. John Smith.

JOHN SMITH was brought before the Court on the 27th December 1837, charged with Theft,

Theft.

IN SO FAR AS, on the 28th May, 1828, John Buchanan, &c., having, on or near the public road leading between Milldamhead and Ecclefechan, &c., and on or near that part of said road which is within a quarter of a mile or thereby of Ecclefechan, or on or near some other part of the said road, the particular place being to the prosecutor unknown, dropt or lost L.112 or thereby in bank or bankers notes, a bill of exchange for L.18, a receipt for 18s. 6d., and a pocket book, the property or in the lawful possession of the said John Buchanan, the said John Smith did, place above libelled, on the 29th May 1828, find the said money and other articles, and did then and there, or at some other time and place to the prosecutor unknown, appropriate the same to his own uses and purposes, he well knowing the same to be the property of the said John Buchanan, and did wickedly and feloniously steal and theftuously away take the said articles, &c.

LOGAN, for the pannel, having objected, that the *species facti* libelled did not amount to Theft,—the Court ordered Informations on the relevancy of the Indictment.

In the Information for the prosecution it was argued,—

The chief difficulty with which the prosecutor has to contend, arises from the expression of opinion upon this subject by Scotch writers, of such authority as Burnett and Hume.

No. 8. John Smith, March 12 1838. — Theft.

Burnett (p. 123.) lays it down, that "if B. finds a par-"cel, suppose on the highway, that had been lost or "amissing, and carries it off fraudulently, and with a "view to make it his own, he is not guilty of theft, not "having *taken it*, either *de facto*, or *de jure*, *out of the* "*possession* of the owner, and this holds, though the "thing is taken in such circumstances as that the finder "could be at no loss to discover the owner, and to restore "it to him." This broad statement of the law is founded upon the single case of Elliot, 2d July 1618,[1] which upon

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[1] The entry of this case in the record is as follows:—

Curia Justiciarii S. D. N. Regis tenta in pretorio de Edinburgh secundo die mensis Julii 1618, *per Magistrum Alexandrum Colvil.*

Intran. Gilbert Ellote callit Gib the Galyart

Dilaitit of the thiftious steilling of ane purs fra John Armestrang, callit of the Holme, under silence and clud of nyght, within the dwelling-hous of Alex^{r}. Young in Selkirk, in the month of May last, be taking the said purs with fourtie punds being therein furth of the said John Armestrang's breikis in maist theftuous manner, and drinking of ten merkis of the money that was therein, and abstracting the rest of the fourtie pund, unto the tyme the samyn was challengit upone him, and restorit bak againe therefter to the said John Armestrang awner thereof.

* * * * * * * *

The pannell declairit that he nawayis staw the purs in manner specified in the dittay, Bot allanerlie that he being in Alex^{r}. Young's house in Selkirk, rysing in the morning, fand the purs upone the flure of the chalmer, quhilk he retenit, and spendit of the money that was therein ten merkis allanerlie, in recompence of the supper, and restorit the said purs with the rest of the money being therein to the said John Armestrang as sone as he understand the samyn pertenit to him. Affirming that the said John Armestrang wald noways insist aganis him for thift.

The Advocat anseris, that his declaration maid can nocht be respectit, bot he sould be put to the assyse in respect of his deposition maid be him in presence of the Justice, confessing the stealing of the purs and money therintill in manner specified in the dittay.

The Justice ordainis him to pas to an assyse, notwithstanding of his former allegeance and declaratioun mad be him thereintil.

Assiza.

* * * * * * *

No. 8. John Smith, March 12 1838.

Theft.

examination does not appear to support the doctrine laid down. In that case, Elliot was accused of theft. In his declaration he stated, that he found the purse upon the floor of the chamber. The prosecutor seems to have founded upon a previous confession which had been taken upon oath in presence of the Justice, and it does not appear that any evidence was led. No direction appears to have been given by the Court; and the Jury returned an unintelligible special verdict, which, however, cannot be considered an acquittal, since it was immediately and without objection followed by a sentence of scourging and banishment for life. Mr. Burnett thinks he has removed the difficulty, when he suggests that Elliot might be guilty of a wrong, though not guilty of theft; but it will be observed that the only offence charged in the dittay, is the theftuously stealing of a purse; and it must be presumed, however loose the practice was at that time, that the Court considered the verdict to be a conviction of theft. If, however, it be maintained that the verdict amounts to an acquittal of theft, it by no means follows that it proceeded on the ground, that the property had been lost by Armstrong, and found and appropriated by Elliot.

Quhilks persons of assyse being chosin, suorne and admittit, eftir accusatioun of the said Gilbert Ellote be dittay, of the steiling and away taking of the said Johne Armestrang's purs, and fourtie pounds money being therein, in manner specified in the dittay; removit altogidder furth of court to the assyse-house; quhair thay electit the said John Scott in chancellar; resonnit and voittit apone the pointis of the said dittay, and being advysit therewith, reenterit agane in court; quhair thay be the mouth of the said chancellar, for the maist part, fand, pronuncit, and declarit the said Glibert Ellote to be fylit culpable and convict of the away-taking furth of Alex^{r}. Young's hous in Selkirk, of the said John Armestrang his purs, with fourtie pounds being thereintill; quhilk purs was delyverit bak againe to the said John, and haill sowme abone specified, except ten merkis thereof allanerly; and clangis him of the steiling of the samyn. For the quhilk caus, the Justice ordainit the said Gilbert Ellote to he scurgit throw the burgh of Edinburgh, and also to be actit to be banishit furth of this realme, and nevir to be fund again within the samyn without his Majesties licence, under the pane of deid, but favour, as convict of the said cryme.

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It would rather seem, indeed, that the Jury were not satisfied of the appropriation, and that they intended to acquit the accused of the theft of that part of the property which he restored to the true owner. In either view, it is plain that this authority does not in any degree support the position of Mr. Burnett.

One other case is mentioned by him in connection with this subject, although not cited as the ground of his opinion (Geo. Scott, Glasgow, Sept. 1802.) A person was accused of stealing goods "from off a cart somewhere "between the College of Glasgow and the toll-bar at the "basin of the Monkland Canal." His defence was, that he had found them on the road, and, not knowing where to send them, had kept them. Mr. Burnett says, the Court directed the Jury to acquit, if they thought the story true. Nor does it appear what other direction could have been given in the circumstances. In the first place, if the facts were as stated by the accused, he, having taken the goods from the road, could not be convicted upon a charge of stealing them from a cart; but, secondly, if he could make it appear that there were no means of ascertaining the true owner of the property, and that he only retained it to deliver it to him if he should appear, it would be a great stretch of the law to hold, that the appropriation of such *res nullius* amounted to theft. It is remarkable that the indictment did not set forth any possession as in the driver of the cart; and it may be suspected that this had some influence on the Judge's charge. The Court assuredly did not mean to lay down the law, that a charge of theft could not be maintained, in any circumstances, against a person carrying away and appropriating goods dropt from a carrier's cart.

Baron Hume, (vol. i. p. 62.) appears to have adopted the opinion of Burnett in this matter, with less than his usual discrimination and care. He states, that a landholder, finding a stray animal in his field,—or a hackney coachman finding a parcel in his coach,—or a passenger finding a pocket book upon the highway, which has the

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owner's name marked on it,—and appropriating that property, is not guilty of theft,—*because there is no felonious intention, nor even a trespass, in the first occupying of the thing*. It is not easy to conjecture, how this learned writer should have been led into a position, so inconsistent with the whole decisions of the Scotch Courts, and with his own statements and principles in other parts of his work. It arose, perhaps, from his attention being directed immediately before to the nice distinctions between theft and breach of trust, which turn so much upon the manner of the *first occupying of the thing*. It is possible, too, that Baron Hume had in view the more ancient authorities of the law of England, and had not attended to the modification which has been forced upon the English Courts in their more recent practice. Be this as it may, no point is more settled in the law of Scotland, than that theft may be committed where *there is no felonious intention, nor even a trespass, in the first occupying of the thing* (Shand, 11 Dec. 1704; Hume, vol. i. p. 67. Wyllie, July 1829; Alison, vol. i. p. 253. Mitchell, May 1829; Shaw, p. 220. Murray and Tait, Nov. 1829; Ib. p. 225.)

In the Roman law it is laid down, (Dig. L. 47. Tit. 2. § 43.) "*Qui alienum quid jacens, lucri faciendi causa "sustulit, furti obstringitur;*" and it is added, that this holds, whether the taker know the owner or not. The correctness even of the latter part of the proposition, seems not indefensible, when we consider that in all charges of theft, though it is essential to set forth the property, it is by no means necessary to assert the thief's knowledge of the proprietor. The passage continues:—*Quod si dominus id dereliquit, furtum non fit ejus, etiam si ego furandi animum habuero. Nec enim furtum fit, nisi sit cui fiat. In proposito autem nulli fit: quippe cum placeat Sabini et Cassii sententia, existimantium statim nostram esse desinere rem, quam derelinquimus. Sed si non fuit derelictum, putavit tamen derelictum, furti non tenetur. Sed si neque fuit, neque putavit, jacens tamen tulit, non ut lucretur, sed redditurus ei cujus fuit,*

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non tenetur furti. Proinde videamus, si nescit cujus esset, sic tamen tulit, quasi redditurus ei, qui desiderasset vel qui ostendisset rem suam, an furti obligetur? Et non puto obligari eum. Solent plerique etiam hoc facere, ut libellum proponant continentem, invenisse, et redditurum ei qui desideraverit: hi ergo ostendunt non furandi animo se fecisse. . . . . Quaestio in eo est, an pro derelicto habitum sit. The general principle here enunciated is, that he who takes the property of another, though dropt or lost, provided he has no ground to believe it intentionally abandoned, is guilty of theft. It cannot be doubted that such an action is an offence against honesty; and it is worthy of consideration, whether it can come under any other category of crime than that of *theft*. If it were proposed to charge such an offender with *breach of trust*, because of the legal trust which may be said to be created by the act of finding, the same arguments would be effectual against it, which have caused the charge of theft to be supported in other cases, where the property came into the hands of the taker, for a special and temporary purpose. If a trust is created by the finding of lost property, it is for the purpose of restoring it to the owner; and when the finder changes the character of his possession so entirely as to appropriate it to himself, he commits theft, as much as the shepherd who steals his master's sheep, or the butler who steals his plate.

That the law of Scotland was in this, as in other matters, founded on the civil law, is proved by the authority of Mackenzie; (Tit. 19. § 4.) "And in our law, likewise, "he who finds a waif beast, which hath strayed from "the owner, should cause cry it either in the Court of "his Over Lord, or in the church, or else he may be "pursued for theft; and theft is likewise punishable, "albeit the person be not known from whom the thing "was stolen."

It was from no ignorance of the civil law that the early institutional writers of England established a different

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principle in cases of appropriation of found goods. Coke (3 Inst. c. 47.) rests the distinction in favour of this offence on the lawfulness of the first taking:—"If one "lose his goods and another find them, though he con- "vert them *animo furandi* to his own use, yet it is no "larceny, *for the first taking is lawful.*" On the same principle, he lays down that goods passing by *bailment*, where the *possession* passes, cannot be stolen by the taker, and distinguishes these from goods given "*for a special* "*use to a special purpose*," of which the holder having only the *charge*, is guilty of larceny if he appropriate them.

Hawkins, (P. C. Book I. chap. 33, sect. 2.) whilst he affirms the same, places the appropriator of found goods in the same class with the person "who has "the actual possession of my goods by my delivery "for a special purpose," as a carrier, a tailor, &c.; and then says, (sect. 3.) "herein our law differs from the civil, "which, agreeably to the Mosaical law, having no capital "punishment for bare thefts, deals with offences of this "kind as such, as in strict justice most certainly it may; "but our law, which punishes all theft with death, if the "thing stolen be above the value of twelve pence, and "with corporal punishment if under, rather chuses to "deal with them as civil than criminal offences."

Sir Matthew Hale as decidedly declares, (vol. I. p. 506,) "if A find the purse of B in the highway, and take it and "carry it away *animo furandi*, . . . yet it is not felony."

But the later series of decisions in England has greatly modified the effect of those early authorities, and has placed the law, in this respect, very much in the same situation with that laid down in the digests of the civil code.

Russell, (vol. ii. p. 102,) after stating, as he was bound by his allegiance to Coke and Hale, that the taking of found goods does not amount to larceny, goes on to say, that this doctrine must be understood with great limitation, and quotes numerous cases, all of which go to establish, that "if a party finding property, even upon the high-

"way, and knowing the owner of it, convert it to his own "use, that is theft."

East, (Pleas of the Crown, p. 665,) after stating the same limitation, and pointing out the circumstances which will imply a felonious intention in the taker of found goods, makes the following judicious remark, "On the other hand, evidence to shew that the finder "endeavoured to discover the true owner, and kept the "goods till it might be reasonably supposed that he "could not be found; or, that he made known his ac- "quisition, so that he might make himself responsible for "the value, in case he should be called upon by the "owner, are circumstances to rebut the implication of a "felonious taking and conversion."

Roscoe, laying down the old law, and founding on the same authorities, states the following distinction, "If the "sheep of A stray from his flock into that of B, and the "latter, *by mistake*, drives them with his own flock, or "shears them, that is not felony; but, *if he know the* "*sheep to be another's*, and marks them with his own "mark, that would be evidence of a felony." (Law of Evidence in Criminal Cases, p. 472.)

And an author, who is believed to be the latest authority on the criminal law of England, states the doctrine of the early Institutional writers, with a limitation unknown to them, but which is now more completely established in practice than that doctrine itself. "If a man "lose goods, and another find them, and *not knowing the* "*owner*, convert them to his own use; this is no larceny," and adds, "it is clearly otherwise, *if he know the owner*;" and "in every case in which there is any mark upon the "property by which the owner may be traced, and the "finder, instead of restoring the property, converts it to "his own use, such conversion will amount to larceny." (Archbold's Summary of the Law of Pleading and Evidence, p. 159.)

Finally, the Commissioners on the Criminal Law of England, (1 Report, p. 18,) state authoritatively, "The

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" intention of a person taking property by finding, will be " felonious or not according as his conduct in omitting to " use due diligence to discover the owner, or in concealing " the property, or in other circumstances, shows that in " the taking, he had, or had not a design to deprive the " owner altogether of his property."

These statements of the present law of England are in truth only a condensation of a mass of judgments, delivered and received as law by the most learned and eminent of the modern Judges. (Cases of Lamb, 1694, 2 East. 664. Wynne, 1786; 1 Leach, 413. Sears, 1784. Ibid. p. 415, *note*. James, 1812; Russell, 2, p. 102; opinion of Mr. Justice Park in the case of Pope, 6 Car. and Pa. 346; of the Lord Chancellor (Eldon,) in the case of Cartwright and Green, 8 Vesey, 405; 2 Leach, 952; and of Mr. Justice Laurence, Stafford summer assizes, 1804, 2 Russell, p. 102.)

The law of Scotland, if it ever were in practice as laid down by Burnett and Hume, has undergone a similar change, and a constant series of modern decisions has fixed, that it is not necessary to support a charge of theft, that there should be *a felonious intention, or even a trespass in the first occupying of the thing*, as required by Baron Hume, (vol. i. p. 62.) The result of these cases unquestionably is, that, however lawful the first possession, the crime of theft is committed, when the character of that possession is changed by any felonious act of appropriation.

With regard to the cases of horse-stealing, where possession of the horse was obtained by hiring, (to which reference is made in the Information for the pannel,) it may indeed be convenient for fixing the *locus*, however fallacious, to suppose that the design of stealing,—the felonious intent,—exists from the first receiving of the horse. It is of course very often true, and whether true or not, it is scarcely possible for the pannel to redargue that presumption. But it may be confidently affirmed, that the numerous judgments of the Court, before and since the date

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of Mr. Alison's work, proceeded on the ground that the conversion of the horse, though lawfully obtained, to the borrower's own use, was felony and theft. The case of stealing a hired horse is not indeed different in principle from the other numerous cases, where the first delivery of the goods is for a special and specific purpose. It is when the hirer first forms the design to appropriate,—first moves a step in the direction to a different place from that covenanted and originally designed for restoring the horse —that our law fixes the theft to be committed. This is well illustrated in the frequent decisions which have been required for distinguishing breach of trust from theft. It is now settled law, that a porter or servant entrusted to deliver sums of money to a variety of persons, appropriating those sums, is guilty of theft, (M'Intosh, Feb. 2, 1835, Shaw and Dunlop, vol. xiii. p. 1168.) In like manner, a clerk employed to pay money for a wine-licence, commits theft if he appropriate that money, (Field, High Court, Jan. 22, 1838, *Ante* p. 24.) A clerk drawing money from a bank on his master's cheque, and converting it to his own use, is guilty of theft. In these cases, it cannot be said that the first receiving was felonious. It might be totally without any premeditation, and in some instances, almost contrary to the will of the servant acting under his master's orders.

The pannel seems to hold, that the *contrectatio fraudulosa* of the definition of theft, must apply to the first acquiring, instead of extending it, with the civil code, to the first handling with felonious intent of appropriation. It seems impossible, on any sound view, to support that distinction. The crime is not morally higher, if the finder see the handkerchief drop from a passenger's pocket, than if he read an acquaintance's name marked on it after finding. It cannot be said to vary the nature of the offence, though the lettering of the owner's address on a packet found on the road, be in one case so large that the finder may read it before handling, and in another so small that he must raise the parcel to his eye to read the address. In

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both cases the first finding is, as the pannel pleads, perfectly innocent; but when the reading of the address has given information and easy means to detect the true owner, then a duty is imposed—a trust is created—the failure in which amounts to theft.

In the Information for the pannel it was argued,—

The whole system of the criminal law of Scotland is pervaded by a principle, by means of which it may at once be determined, whether, under the present or any given *species facti*, the crime of theft has been committed or not. That principle may be stated thus:—*The true character of any act, (said to constitute theft) by means of which one gets possession of the property of another, is to be fixed according to what may have been the purpose and intention of the individual (the alleged thief) who gets it, at the very instant he does so; and wherever, at that particular juncture, he shall not have entertained the* PRESENT FELONIOUS INTENT *of appropriating such property to his own uses and purposes, the act founded on will not afford a ground for a relevant charge of theft.* This principle is clearly implied in the usually received definition of theft—a definition, in which, to use the words of Mr. Hume, " all its ordinary characters seem to be set forth," —in which the crime is described as being *contrectatio fraudulosa rei alienae, lucri faciendi gratia.* That the fraudulent or furtive taking of the thing is in reality the essential requisite of the crime, appears from a variety of considerations. Where there has actually been such a taking, though no appropriation may have followed, the crime of theft is held to have been committed (1 Alison, p. 266.) Thus, where one is seen in the act of taking, and, being detected, throws down the article and runs off, the law regards the inchoate act as constituting a theft. In like manner, where property has been feloniously abstracted, and the party, who has done so, instead of appropriating it, or even evincing any wish or intention to do so, offers to make, or actually does make, restitution, he has notwithstanding been guilty of theft, and has sub-

jected himself to all the consequences of that offence, (Burnett, p. 121.) On the other hand, where one has simply taken another's property, the crime is here held not to have been committed, provided the *felonious* character of the taking is precluded by the party having done so under any notion of right, however mistaken, (1 Alison, p. 270-1.) Such instances, and many similar ones might readily be given, show sufficiently, how essential to the very notion of theft, is a *felonious* first taking of the thing.

On the other hand, if there be any truth or consistency in that deduction, it must follow that, even when there has been a wrongous appropriation of another's property, yet, if there exists not any such felonious first taking of the thing, the crime of theft has not been committed, (1 Hume, 59, 60.) That such is actually the case, is shewn by the circumstance, that where there has been a delivery of goods by the owner to another party, for some limited and temporary use, as in pledge or simple deposit, the appropriation of them by the latter to his own behoof does not constitute a theft. There are indeed *two* different classes of adjudged cases, which, at first sight, seem to impinge on the principle under consideration. The *first* comprises certain cases of horse-hiring, followed by the hirer appropriating the animal to his own uses and purposes; the *second*, certain cases of abstraction and appropriaton of a master's property, by a butler, clerk, or other servant.

1. In regard to the *first* of those two classes, it is important to observe that, in the opinion of Mr. Hume, horse-hiring, terminating as just stated, is not necessarily a theft. On the contrary, he expresses himself very clearly, (Vol. i. p. 58.) that "the after-conversion of the "thing to the possessor's own use, by selling, &c. "though it is a wrong, and even a criminal act, does "not, however, amount to the crime of theft." "The "reason," he goes on to add, "is obvious, there has been "*no felonious taking out of the owner's possession.*" The only adjudged cases on the point so far as reported, are

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those of Marshall, 1792, Tyrie, 1827, and Smith, 1829; (Alison, vol. i. pp. 259-260,) and it is at once admitted that, if they establish as an absolute rule of law, that to hire a horse, and subsequently to appropriate it, necessarily and invariably constitutes the crime of theft, they derogate materially from the principle,—that there is no theft, where the first taking is not felonious. It is submitted, however, that they by no means establish any such rule; and that the utmost length, to which they can be pushed, is simply this, that in all of the cases in question, the Court, having reasoned from the facts stated in the various indictments, delivered the opinion, that in the peculiar circumstances of each case, the pannel, supposing those circumstances to be true, must have been guilty of theft. They did not, it is conceived, lay down, (or mean to do so) as an unbending, absolute proposition, that horse-hiring, followed after a certain interval by appropriation, is and must be theft; but merely that, judging from the proved or admitted facts of each individual case, the hiring, in all of the three, was a mere pretence, assumed to conceal or give a colour to a felonious intent, which, from the very beginning, must have existed in the pannel's mind, (See Burnett, p. 113.) In the case of Smith, accordingly, the Court were not only of opinion that the accused had, on the assumed facts, been guilty of theft; but were further satisfied that "the proper *locus* "of the crime was *the place where the horse was* FIRST "*obtained by the pannel.*" Now, it seems very evident that the Court would not have indicated such a *locus* as being the only proper *locus* of the theft, unless they had also been of opinion that, at the instant of entering into the fraudulent contract, the felonious intent to steal had been actually present in the pannel's mind, (See Hume, vol. i. pp. 59, 69.)

2. The *second* class of cases, which forms another apparent exception to the principle that, where the first taking is not felonious, there is no theft,—relates, as has been said, to the abstraction and appropriation of a mas-

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ter's property by a servant, or other person in his employment. For example, a groom takes his master's horse from the stable and sells him; a butler removes the plate from the pantry or sideboard, and disposes of it; a clerk or servant receives a bank-cheque from his employer, with orders to draw the amount and bring it to him, instead of doing which, he absconds with it; a drover is engaged to drive a flock of sheep to market, and goes off and sells it for his own behoof: in all of those cases, the particular *species facti* of each has, either by direct adjudication, or unavoidable inference, founded on a perfect analogy, been held to constitute the crime of theft. The reasons why they are so are stated by Mr. Hume (Vol. i. p. 64.) to be, that "though a trust is "given, as far as relates to the care and custody of the "thing for particular uses, yet the constructive possession, in the estimation of the law, is still with the owner, "and not with the immediate keeper, *who holds it as a* "*hand only, and for the behoof of his employer.*"

The grounds on which such cases are cases of proper theft, by no means affect the proposition, that, where the first taking has not been felonious, there has been no theft. For, in addition to what has been stated by Mr. Hume, it is to be remarked, that in the cases of the butler, the groom, the shepherd, and the clerk, the contract betwixt each of them and his employer is simply the contract *locatio operis*, in virtue of which, the one party agrees to give his services, and the other a certain stipulated remuneration therefore. It is solely under that contract that any of the above-named parties undertakes his employment; in doing which, no one of them gets possession (actual or constructive) of his master's property; although, in consequence of an *accident* not an *essential* of the contract, his services may indeed have a certain relation towards it. In this way the butler comes to clean and set out the plate, the groom to dress and exercise the horses, the shepherd to tend the flock and keep it from straying,

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whilst the clerk posts his employer's books, or carries his cash or bills to the bank. But, during all this, no one of them has to do with the property in question, *further than to expend his own labour upon it.* For notwithstanding the contract, and the service consequent thereupon, the plate is, if not immediately under the master's eye, at least in his own closet or sideboard—the horses are in his own stable,—the sheep are in his own fields,—and his ledger, his cash, and bills, on or in his own desks. Such being the case, let it be supposed that in any of the above instances, the servant commits a felonious appropriation of some part of his master's property, and thus becomes chargeable with the crime of theft. Such an appropriation could not possibly have been committed, *without the removal of the articles out of the master's constructive, into the servant's actual possession;* inasmuch as, without such a change in the possession, the *animus furandi*, essential to constitute the crime of theft, could not have been known, or even suspected. Such a change, however, when it did take place, constituted in reality the *first taking*, as, until it occurred, there was in the servant no *possession* of any kind; and as, without such possession, he already had all that was requisite for the honest purposes of his service, the assumption of it must to a moral certainty have been dishonest.

The *species facti*, in the present case, consists of four parts. 1. The *loss* by the proper owner of the things said to have been stolen. 2. The *finding* of them on the part of the pannel. 3. Their *appropriation* by him to his own uses and purposes. 4. His *knowledge*, after he so found and when he so appropriated them, of the party who was the proper owner.

In regard to the time and place when and where the two first of those particulars are said to have occurred, there is nothing very unusual. The things are stated to have been lost on the *twenty-eighth*, and found on the *twenty-ninth* of May 1828: and, though an extent of

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about fourteen miles of road is actually comprised in the *locus*, as given, such a latitude, the nature of the case considered, is by no means very exceptionable.

On the other hand, in regard to the time and place of their alleged felonious appropriation, an unusual, and, probably, an indefensible latitude has been assumed.

It is now nearly ten years since the crime (as is said) occurred; so that were the indictment held to be relevant, and, as such, sent to a jury, the Prosecutor,—on proving a finding at the time and place libelled, and an appropriation any where, either within or without the kingdom, at any time from May 1828 till June 1837, when the present charge was brought,—would be entitled to a verdict in his favour. Of this latitude, great and unusual as it is, the pannel does not, however, complain; as the charge has probably been framed in that way, for the purpose of more perfectly testing the principle, which, it was foreseen, would, in the peculiar state of the facts, come to be evolved.

The *finding* of the lost property is the fact which associates the pannel with all the circumstances which precede and follow it. If, then, the principle, already so often stated,—that there is no theft, where the first taking is not felonious,—be a correct and well founded one, the proper question here would seem to be, what is the legal and natural character of that fact?—Is the taking, by means of finding, innocent, or the contrary? Now, it seems undeniable, that the finding of lost property is, abstractedly viewed, a perfectly innocent, and even,—so far as a mere accident can partake of moral distinctions—a praiseworthy act; in so far as the person, who,—having discovered a valuable article lying exposed to certain loss or destruction,—should deliberately leave it in the same condition, would be deeply culpable, though perhaps not subject to legal punishment. It is readily admitted, that on evidence being led, an alleged, and even an apparent finding may turn out to have been no finding at all, but a very complete theft; but it is to be carefully noticed

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that, from the way in which the present one is alleged to have occurred, it must, in the first instance at least, have been necessarily an innocent act, and not improbably, even a commendable one. For, in the first place, the pocket-book is said to have been found on the public road, —a circumstance which, as it implied the total abandonment of it (abandonment *de facto*) on the owner's part, raises a strong presumption that the finding could not well have been otherwise. Though by no means essential, it is still far from immaterial to remark that, while the loss is said to have occurred on the 28th of the month, the finding did not take place till the 29th, as it tends to shew the extent of the owner's dereliction of his property, —the entireness of his separation from, and disconnexion with it. In addition to the presumption of innocence thus raised are the express words of the libel, on referring to which it will be seen, that the guilty knowledge of who was the true owner, (necessary in any view to constitute a theft,) is not connected with the act of the finding, but with the totally distinct act of the *appropriation*, which is itself alleged to have occurred, " either then and " there, or at some other time and place to the Prosecutor " unknown." In this way, it is quite certain that the appropriation could not have occurred until *after the finding*; consequently, the guilty knowledge, which is not stated *substantively*, but as a *mere quality of the fact of appropriation*, could not have occurred sooner. It thus follows, that, as the appropriation took place, neither *before* nor even *during*, but long subsequent to the fact of the finding, the first taking of the thing, consequent on that, must necessarily have been of itself innocent.

Now, while such seems clearly to be the case, it must follow, on the other hand, that, if the present indictment is held to be relevant, and the facts of finding and appropriation shall be proved, the Prosecutor will have a claim to a verdict in his favour. To that indeed he will have a claim, even though the finding shall appear to have been (as actually stated) an innocent act on the pannel's

part. Nor does the matter stop here; but the same result must ensue, even though his possession—consequent on the finding,—should, for the greater part of ten years, appear to have been equally without blame, provided an appropriation, accompanied by a guilty knowledge of the true owner, shall be proved to have taken place, though not until the latest week of that period.

Although, indeed, quite true, that the law has respect rather to overt actions than to secret motives; nevertheless, to hold that the character of a criminal act is to be determined—irrespective altogether of the intentions of the wrong-doer at the first stage of the crime—only by what he may have felt and purposed long subsequent to it, would be to carry that proposition to an extreme length. For, in the present case, to regard the felonious intent—the essence of the wrong—as exclusively belonging to the posterior appropriation, would be to dissever it entirely from the prior finding, which would thus be degraded into a mere accident, instead of being, as it is—if any thing,—a material part of the crime. Yet, in addition to all that, for the Prosecutor to effect such a separation would be to contradict a principle which is vital to his present argument, which—by maintaining that finding, united to appropriation, is no less than theft—has given to the act of finding a peculiar stringency of effect. Such a quality does not belong, for instance, to the act of taking property in the case of deposit, pledge, or other title of that sort; for none of those, though combined with appropriation, amounts to a crime so highly penal as is theft, nor is any of them so little culpable as, abstractedly viewed, the act of finding is. Yet, stringent and peculiar as the Prosecutor may desire to make that act, he at the same time, by drawing betwixt it and the wrongous appropriation a line of separation (as to time) of nearly ten years breadth, reduces it to the same level with those other modes of taking, which, though joined with the other requisite of the offence, have been deemed ineffectual to constitute theft.

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Even if (as was indeed proposed at the bar,) the words, "*or at some other time and place to the Prosecutor unknown*,"—as indicative of the period of the wrongous appropriation—were struck out of the libel, the case would not be materially altered. For, if finding is once admitted to be an innocent act, the principle contended for will be satisfied, in so far as the first taking of the thing must needs be *not* felonious; and, if so, it is difficult to see any difference, so far as the mere argument is affected, betwixt the case of the finding retaining that character for ten years, or losing it in so many seconds. It is admitted that a person who seeing a purse, pocket-book, or other article actually dropping from the person, or out of the *personal* and *visible keeping* of the ostensible owner, runs forward, picks it up, and instead of restoring it to him, appropriates it to his own behoof, is guilty of theft. But this is so just because the initial act—the first taking of the article from the ground—must have been a felonious one, having been done in the present, or rather the antecedent knowledge of the true owner, and, consequently, having wanted nothing but the appropriating act to constitute the crime.

The view now contended for has the support and countenance of two of the best-known writers on our criminal jurisprudence, (Burnett, p. 123; Hume, vol. i. p. 62.) In his statement of doctrine, each of them has adduced one and the same adjudged case; rather, however, as it would seem, in illustration of, than as express authority for it, (Gilbert Elliott, July 2, 1681.)

It is important to notice, that the opinion of Mr. Hume at least in noways depends on the case of Elliott. The instance of a passenger finding a pocket-book on the highway, is stated by him merely as one out of a host of other cases, in which the peculiar *species facti* adduced did not constitute the crime of theft. On turning to the passage itself, it will be found that his doctrine is in no degree suffered to depend on the case in question, but that, on the contrary, it is a broad and comprehensive statement of the

proposition—that, where the felonious intent exists not at the first taking, there is no room for holding that theft has been committed. The ground assigned by Mr. Burnett, for holding that the case under consideration does not amount to theft, is the circumstance that such articles as can properly be said to have been *found*, are, at the finding, out of their owner's possession. But on a page previous to those referred to, (p. 121,) he remarks:—"On the question of intent, as applicable to this crime (theft), "*it is the intention at the time of taking that de-*"*termines the guilt of the offender*, so, if the goods are "fairly acquired, any after purpose to convert them to "the possessor's use will not make it theft."

In regard to the use made by the prosecutor of the Roman law, it is material to notice that that system, as embodied in the *Corpus Juris*, relates almost wholly to civil rights and obligations, and to the varied modes of enforcing the one and protecting the other, (Vid. Dig. L. 47, Tit. 2, *de furtis*; Heineccius *ad Institutiones*, § 1047, 1063.) To accomplish this desired and exclusive object, the law, by the free adoption of fictions where principles were unavailing, strove to reach any wrongous occupant of another's property as a thief, whom, owing to peculiarities in pleading or other causes, it might have been hard or impossible to get at in any other way.

Accordingly, many of the cases there recognised and treated as theft, are either totally unknown to our law, or are included under some other denomination of offence, (*Voet ad Pandectas*, Lib. 47; Tit. ii. sec. 5 and 6.) Of the former of those is an extensive variety of cases, where the subject of theft is the *use* or the *possession* of an article; the one committed by the true owner wrongously taking a thing from a temporary possessor; the other by a depositary making use of what he had merely keeping, as where one wears a ring on his finger which he ought to have had locked in his repositories. Of the latter are certain cases, which with us are looked on as involving merely the offence of fraud or of swindling; as where

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one wilfully receives money which he knows to be not due, or, by falsely assuming the character of a procurator, exacts payment of a debt, or takes up money deposited in a law-suit. On the other hand, the Roman lawyers—rigidly narrowing their practice to the terms of their definitions—refused to recognise as theft, cases which with us would be regarded as very gross instances of that crime. For example, as the taking for lucre's sake formed part of their description of the crime, it was, therefore, accounted no theft, if one took away another's goods merely to annoy, injure, or insult him; whilst it seems to have been seriously doubted whether or not it had taken place, though property to any amount had been abstracted—provided it were given in gift by the taker to a third party.

From such instances, and many more might readily be given, it will be seen how dangerous it is to resort to the books of the civil law even for analogies. The danger is, of course, greatly heightened, and the consequences might be very serious, if that code—in addition to being reverenced as a repertory of legal wisdom and subtle discrimination—should be formally raised into an authoritative standard, by which to try the principles and practice of a system so different from itself.

In regard to the authorities drawn from the English law, the doctrine, about to be quoted from Sir Matthew Hale, was drawn from his great predecessor, Sir Edward Coke, and has been repeated—as the then existing law of England—by every legal writer from his days to our own.

"If A find the purse of B in the highway, and take it "and carry it away, and hath all the circumstances, that "may prove it to be done *animo furandi*, as denying or "secreting it, yet it is not felony." (Coke's Third Institute, p. 108; 1 Hawkins, p. 89, folio ed.; 2 East, p. 663; 2 Russell, p. 100; 3 Chitty on Criminal Law, p. 926; Roscoe, p. 474; 1 Hale, p. 506.)

But it is alleged by the prosecutor, that the law, as thus laid down, has been changed in recent practice; and various cases are adduced in support of the assertion.

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In regard to some of them, it is submitted, that so far as they go, they do not at all derogate from the principle to which they have been thought to be unfavourable. (Case of Lamb, 1694; 2 East, p. 664; Wynne, 1786, 1 Leach, p. 413; Sears, 1789, ibid, p. 415, note.)

With regard to the case of Cartwright *v.* Green, (2 Leach, 952; 2 Russell, 102,) it appears to have been determined upon grounds which by no means touch the present point. But in the speech of the Lord Chancellor (Eldon) at delivery of judgment, the principle now contended for,—far from having been denied—received the amplest confirmation. "*To constitute felony*, says his "Lordship, *there must, of necessity, be a felonious taking* "—breach of trust will not do. But from all the cases "in Hawkins there is no doubt, that this bureau being "delivered to Green, *for no other purpose than to repair*, "if he broke any part *which it was not necessary to touch* "*for the purpose of repair*, with an intention to take and "appropriate to his own use what he should find, that is "a felonious taking, within the principle of all the mo- "dern cases, as *not being warranted by the purpose for* "*which it was delivered.*" (See also East, vol. ii. p. 693.)

Two cases are adduced by the prosecutor, for the purpose of shewing that the present question has already been ruled in England, to the effect that finding, followed by appropriation, is no less than theft. (Anon. Stafford summer assizes, 1808. Rex. *v.* James, Warwick summer assizes, 1812, 2 Russell, p. 102.) But both of these decisions were pronounced on circuit by a single Judge—neither had probably the advantage of being pleaded at length or deliberately considered; whilst, instead of having been reported at the time,—in which case risks of error or misapprehension were less likely to occur—they have for the first time been published by a private writer, nearly twenty years later than their own date. And it is surely not unimportant, that in more than one work of weight and credit, published of late years, the doctrines of the older writers,—in regard to finding and appropriation,

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as well as of the necessity of a felonious taking to constitute theft—are stated without modification or change. (2 Roscoe, p. 474. 3 Chitty, pp. 919, 920, 926.)

In conclusion, it does not follow that, though the offence charged may not be theft, it must, therefore, pass unpunished and untried. It might be libelled as breach of trust; or should such a charge not be sustained, the prosecutor might—seeing that what is undeniably a serious offence is possessed of no proper *nomen juris*—describe it according to its facts and circumstances, and upon such a statement conclude for the pains of law. (Hume, Vol. II. pp. 168, 169. Alison, Vol. II. p. 230.)

The case came to be advised, this day, when the following opinions were delivered:—

The LORD JUSTICE-CLERK.—When this case came first before the Court, my inclination was to follow Baron Hume and Mr. Burnett; but after giving every degree of attention to the very able argument contained in the Informations on both sides, I have come to be of a different opinion. The point of view in which I wish to consider the case is, that the discovery of the owner's name was made, at the time when the pocket-book and other articles libelled on were found. I do not wish to enter into the question, what the effect would be, if it were proved that this discovery did not take place till long afterwards. But, taking the Indictment as it stands, —looking at the civil law as the origin and foundation of our criminal law,—and having regard to all the authorities which have been referred to, I am of opinion that the charge of theft is relevant. No man living has a higher veneration for the authority of Baron Hume than I have; but I do not think that the single case to which he refers warrants the conclusion which he forms. We are bound to look at the later practice of the Court, which, undoubtedly, has not required a felonious first-taking to constitute theft. And then, when we look at the law of England, —as we are entitled to do, and do every day by way of

illustration,—we find, in the practice there, a strong confirmation of the view contended for on the part of the Public Prosecutor. Although, therefore, I consider this by no means a question free from doubt, and although I am of opinion that the charge might have been much more relevantly laid, by setting forth more distinctly the means of knowledge which the finder had of the owner of the lost property; still I hold that the Indictment, as fairly construed, is relevant.

LORD MEADOWBANK.—The opinion I have formed concurs exactly with that expressed by the Lord Justice-Clerk. I think the *species facti* might have been stated more relevantly, in the way pointed out by his Lordship; but looking at the Indictment as it stands, I think it contains a relevant charge of theft. The Counsel for the pannel has almost admitted himself out of Court; for he admits, that if the pannel had seen the articles drop from the person of the owner, the immediate appropriation of them would have amounted to the crime charged. Now, just take the point a little farther. Suppose, that on the outside of the pocket book he had seen the name of the owner written in legible characters. It must be held that, after this, to pick it up and appropriate it, would be the same thing as to do so after seeing it drop from the owner's person. Now, what is the difference in the circumstance that he goes one step farther? He does not see the name of the owner on the outside, but, having opened the book, he finds it written in the inside; and, having thus taken the only means in his power to discover who the owner is, he immediately forms the intention of appropriating it. Suppose the case of a carrier, one of whose parcels had lost the address,—he opens it in order to discover to whom it belongs, and after having done so, forms the design of appropriating it. Can it be doubted, after the decisions which we have given, that he would be held guilty of theft? The principle on which the cases of horse-stealing, referred to in the Informations, have been decided, is not,—as is maintained for the

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pannel,—that the *malus animus* existed at the time of the hiring. It is of no consequence of what character the original possession of the property is. The moment the intention of appropriating the property of another is formed, then the theft is committed. Such appearing to me to be the principle of our recent decisions, it is a source of satisfaction to find, that, although some very vague notions on the subject have at one time been held by those great men who, in England, have adopted the same views as Baron Hume, the more modern practice in that country is the same as our own.

LORD MACKENZIE.—This Indictment states, in the minor proposition, that John Buchanan having lost a pocket book and other articles, the pannel did, at a certain time and place, find them, and did "then and there, "or at some other time and place to the prosecutor un- "known, appropriate the same to his own uses and pur- "poses, he well knowing the same to be the property of "the said John Buchanan, and did wickedly and feloni- "ously steal" them. This minor proposition proceeds on a major, which charges the crime of theft. Now, it appears to me that this is an alternative charge. It sets forth that he committed the crime in one of two ways,—either by immediately appropriating the articles, or by doing so some time after the finding. I have no doubt the prosecutor intended the charge to have this alternative meaning. Now, if I am right in this opinion, and if you find this Indictment simply relevant, you find that both of these are competent modes of stating the crime of theft. For my own part, I have come to be of opinion that both and each of them do amount to that crime. I have come to this opinion with some difficulty, in consequence of the opposite opinion stated by Baron Hume. I shall apply myself to the consideration of each of the charges separately. (1.) The first charge is, that the pannel, knowing at the moment of finding who the owner was, nevertheless immediately appropriated the articles found. Now, I think this is theft. I think the definition of theft

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applies to it. That definition is taken from the Roman law, and it is a pretty strong proof that we are not entitled to disregard that law, since the only definition of theft which we have is derived from it. It is said that the appropriation of goods in the circumstances supposed, is not theft, because they are not taken out of the possession of the owner. This must mean his *full* possession, because, unless there has been a complete dereliction, they are still in his constructive possession. Now, I know of no authority which limits the crime of theft in the way here contended for. The opinions of Baron Hume and Mr. Burnett would be entitled to great weight, were they not founded, as has been remarked, upon one case. That case has been called a very barbarous decision. But I think that both the verdict and sentence were very consistent with the facts of the case. The pannel had found the purse, which he did not altogether abstract, but only took ten merks out of it, and the punishment awarded against him is appropriate to the theft of that sum. On the general point under consideration, I find it impossible to lay down any rule but that of the Roman law. It was there held, that if the lost property was found in such circumstances, as showed that there was a dereliction of it on the part of the owner, the appropriation in such circumstances was not theft. I cannot doubt that the same would be the rule at this day. Suppose a number of logs, with the owner's name upon them, were thrown overboard in the Firth of Forth, and immediately, or soon afterwards, are picked up and appropriated, this would be theft. But if the same thing was done in the middle of the Atlantic, where there was no hope of their recovery, I think the case would be different. (2.) I come now to the second question, whether, supposing the property to have been taken honestly, and the design of appropriation to have been formed subsequently, the crime is theft. Now, I think that the first possession, in that case, is just a *negotiorum gestio* on the part of the finder. I ask, then, how does the law stand, as to the appropriation by a *negotiorum gestor* of goods committed to his care? We have determined that in the

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case of carriers, servants, clerks, shopmen, the appropriation of goods held on a limited title for behoof of the owners is theft; and of course all these decisions apply with greater force to the case of a finder, who took the goods honestly, and subsequently formed the felonious intention of appropriating them. Suppose the case of a person sending his servant to bring him the goods he had dropped,—if the servant, instead of doing so, appropriated them to his own use, he would be guilty of theft. Now, is the case the least different, because, instead of being appropriated by the proprietor's own servant, they are appropriated by a stranger? I feel the less unwilling to disregard the *dictum* of Baron Hume on this point, because we have been already obliged to reject his authority in the class of cases to which I have just referred.

LORD MONCREIFF.—I concur, especially with Lord Mackenzie. I apprehend it to be quite clear, that the general principle originally laid down by Baron Hume on this subject has been, I do not say altered, but greatly qualified, by recent decisions. A servant who breaks through a trust, and appropriates his master's property, has, in innumerable cases, been found guilty of theft. So, also, the case of appropriation by a clerk who has the custody of goods, even with the power to sell them, has been held to be theft. Then the case of a person hiring a horse, and appropriating it to his own use, is one very much in point. It is argued, in the Information for the pannel, that to constitute the crime of theft, the felonious intention must have existed from the beginning. I am not prepared to go that length. I think a person may have hired a horse for an honest purpose, and subsequently resolved to steal him; and I am not prepared to say that that would not be a case of theft, although the taking must be libelled in some different way, than if it had taken place at the period of the first hiring. So, also, in the case of theft by a carrier of goods entrusted to his care, the time and place of the offence is not when and where he received the goods, but when and where he

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formed the felonious intention of appropriating them. Suppose a flock of sheep are found straying on the public road, with the owner's mark on them, surely we should not hesitate to find, that the appropriation of them by another person was theft. The case of a man seeing a person drop a pocket-book, and picking it up and keeping it, is admitted to be a case of theft. But put another case,—that he does not see it drop, but sees a person resting by the side of the road, and when he comes to the spot finds a pocket-book there; and suppose that he either knows the person by sight, or finds his name written in the book,—can it be doubted that the moment he resolves to appropriate it to himself, that moment he commits theft? It is by accident that he has got possession of the goods of another, but so soon as he discovers who the owner is, it is his duty to restore them. It is a very nice question, whether, if the appropriation did not take place till long after the finding, the case would be the same. Whatever may be my opinion as to the alternative charge, I think the libelling of time and place would not, in that case, be sufficient,—too great a latitude being taken in both respects. But the case before us may be decided on the assumption, that at, or immediately after the period of finding, the knowledge of the owner was acquired, and the design of appropriating formed. In that view, I can have no doubt that the Indictment is relevant. The case of Elliot I do not consider an authority in point, as the jury, while they acquitted him of the theft of the purse and the large sum of money, in fact convicted him of stealing ten merks. It is very satisfactory to us, when we are forced to decide a point of this nature, to find that our decision is consistent with the principles of the Roman code, and also supported by the weight of English authority.

LORD COCKBURN.—The facts here are extremely simple. The Indictment states, that the pocket-book said to have been stolen had been "*dropt or lost*" by the owner, not *derelinquished*. There was, therefore, no

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abandonment of the property, so as to render it *res nullius*. Notwithstanding the temporary loss of possession, the property continued. It is not stated that there was any guilt in the act by which the article was first got possession of by the finder. The guilt is said to consist in his subsequent appropriation, *he then knowing who the proprietor was*. And the question is, whether the criminal appropriation, preceded by the innocent finding, of the lost property of a known owner, be theft? I am of opinion that it is. And I think so on grounds arising out of the law of Scotland alone. The law of England seems to have varied on this point, though I understand it to be now fixed, that if tried by that law, the prisoner, if the facts were proved, would be held to have committed theft. But though it be always satisfactory to find our neighbours at least concurring with us; and though the general principles of jurisprudence be illustrated by references from one system to another, no foreign law, even when we thoroughly understand it, which we can rarely be sure of doing, is of any direct authority in a purely Scottish case; and it is always desirable to rest on our own native ground. The definition which our law gives of theft, is, that it is *contrectatio fraudulosa rei alienae, lucri faciendi causa*—fraudulent taking of the property of another for the sake of lucre. Now, what is meant by this word *taking*? I know no authority, and no principle, for confining it to the act of first possessing. *Lifting* is not *taking*, at least not necessarily; a person may be the recipient of a commodity involuntarily or unconsciously—as by having it put into his pocket secretly, or delivered to him by mistake. He is the *possessor* after this, but not the *taker*. I don't conceive that there can be any taking, in the sense of this definition, without an intention to take. It means appropriation. Accordingly, there are innumerable cases, such as that of servants stealing things committed to their charge, in which the original possessing was quite innocent, but in which, *beyond all doubt*, theft is committed merely by the subsequent application of the property to their own use. There

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is no bringing these cases within the rule, either in its words or in its meaning, without referring it to the appropriation, *no matter when it may occur*, as to the only act of taking. If this be correct, then the original innocence of possessing an article, is not merely no exclusion of the idea of theft afterwards committed by a new act of criminal application, but it has no tendency to exclude it. The guiltlessness of the first occupancy seems to me to be totally irrelevant in reference to the question of subsequent theft. There are two objections stated to this, as applied to the present case. 1st. That there must be an *animus furandi in the first taking*. I agree to this, provided the word *taking* be left to its correct legal sense, of appropriation. But when extended so as to include the original *reception*, it is *quite certain* that the objection is groundless. For there are various cases of clear, and indisputable theft,—such as that of a carrier abstracting a bale committed to him for conveyance,—where property is held to be stolen, because, though got innocently, it is withdrawn by the receiver from its proper destination, and converted to his own use. If the purity of the first acquisition be a defence against a charge of subsequent theft, it would not be easy to say how many have been illegally convicted of stealing. 2d. The other objection is, that there can be no theft, where the owner, though he retains the property, happens for a time to have *lost the possession*. It would require very strong and positive authority to support a doctrine so full of danger. The import of this principle is, that *lost property can never be stolen*. And if this be law, then it is not theft to pick up a watch the instant that it is dropped and to run; nor to carry off the goods of a known owner which have been thrown ashore from a wrecked vessel whose whole crew has perished; nor for a police officer sent to discover the stolen goods of a known proprietor, and finding them in the custody of the thief, concealing this fact and keeping them to himself. This principle would protect the case, where there was a theftuous intention from the first; for if possession by the owner

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be necessary, the absence of this element cannot be supplied by the motive of the taker. So, if lost goods were advertised, and a person were to search for them with the view of appropriating, and were to find, and to keep them, even this would not be theft. Nor would it be theft for a person observing a man bathing to sink and be drowned, to run off with his clothes lying on the shore, for the old owner, by death, had lost possession of them. I know no authority for such a principle. Rather than adopt it, the law supposes every man who voluntarily takes, or who even accidentally obtains possession of the property of another, to be a sort of trustee or custodier for him. In the cases of servants, clerks, porters, &c. this principle may be thought not to apply, because these persons obtain possession under a direct employment by the owner. But there are cases where this circumstance does not occur. Take the case of property *never received*. An unknown stranger holds a packet addressed to the real proprietor. He gives it to a porter to be delivered to that person, who does not know of its existence. The porter keeps it. I think that this would be theft; and that it would be well charged as such, if the crime were set forth as committed, not against the unknown stranger, but against the real owner; because, though not employed by him, the porter having got the parcel, held it as his custodier. I conceive a trust of an analogous description to be imposed by the law upon every one who happens to take possession, or to find himself in possession, of the property of another; but especially where this is the result of his own act. It may not be his duty to lift the property of another; or, if he should happen to do so, he may lay it down again; but from the moment that he begins to keep possession, knowing whose it is, he holds it for that person; and hence would be entitled to resist its being taken from him. If there had been any clear precedent the other way, I should have been for adhering to what had been fixed. But there is no satisfactory case, and our institutional authorities are divided. The prisoner rests upon Burnett and Baron

Hume. Now Burnett goes entirely upon the owner's *loss of possession*; and therefore he goes the full length of applying this principle, even *where there was a criminal taking from the first*. In support of this he rests, and solely, on the two cases of Elliot in 1618, and of Scott in 1802; neither of which, however, sustain, or tend to sustain his doctrine. Elliot's case is either inaccurately reported, or it proceeded on a state of practice which we cannot now understand. He was accused of nothing but "*the theftous* "*stealing of a purse*," by taking it "*from the owner's* "*person* in maist theftous manner." So far as the verdict is intelligible, the Jury acquit, or cleanse him of the theft, but are pleased to convict him of what they call "the away taking furth of Alexander Young's hous in "Selkrig of the said John Armstrong his purse"—an offence with which, as distinguished from theft, he had not been charged, (but for which he was punished). I can make no sense of this case at all. But it is plainly no case on the point now before us; for no such point arose out of the libel, which charged nothing but a stealing from the person. In Scott's case, the prisoner was accused of stealing goods by feloniously *removing them from a carrier's cart*. The defence was, that he *found* them. The Court told the Jury, that if they believed this, they must acquit. This direction, Burnett plainly thinks, could only have been given, upon the principle that a found article could not be stolen. But this is a mistake. It was given because the only fact charged was stealing goods "*from off a cart*,"—a charge which could not be sustained by proving the theft of an article previously lost from a cart. The Jury convicted, that is, they disbelieved the finding. Baron Hume's sole ground is the *guiltlessness of the first act of occupancy*. But I conceive it to be certain that this principle cannot now be maintained. It is inconsistent with many cases of what have been fixed, since he wrote, to be cases of undoubted theft. And, accordingly, in following it out, the learned author himself is obliged to apply it in a way which ra-

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ther staggers one. He makes it not theft for one to hide and keep a neighbour's stray cattle, or goods stranded on his ground. His test is, that if caught in the very act of laying hold, the person could not be even found fault with. To be sure he could not, because his original design being supposed to be pure, his laying hold would be deemed to be for the owner, and it is only when he appropriates that his guilt begins. Nay, the author carries it so far as to lay it down, that a person is not guilty of theft, who, while honestly aiding a proprietor whose house is on fire to remove his goods, yields to temptation, conceals and keeps them. This is certainly the result of the principle; but it humbly appears to me to show that the principle cannot be sound. Against these two we have the opposite authority of Mackenzie and of Alison, who are both decided, and I think on satisfactory grounds. The authorities thus differing, we must look to the principles and the common sense of the thing. The point seems to me to be settled, as soon as these are tested, by being applied to the simple and common case of a purse seen to be dropped by a passenger, and lifted with the honest intention of being instantly restored, but on being found heavy, run off with, and kept. This the prisoner admits to be theft. Now, the mere difference of time is immaterial. The case is the same, whether the loss of possession by the owner, or the interval of innocence in the finder, be long or short. But except in the accident of time, we have here all the elements of the present case; the loss,—the guiltless finding,—the knowledge of the owner,—and the subsequent guilty appropriation. These, in my opinion, constitute theft.

The LORD JUSTICE-GENERAL.—All your Lordships have admitted that this case is one attended with difficulty; and I certainly think that it is so, for most of the cases which have been founded on, as instances of the crime of theft, would, in the days when I was more conversant with the practice of this Court, have been considered breach of trust. Recent decisions, however, appear

to have altered the law on this subject; and any opinion I give in this case, is not to the effect of dissenting from all your Lordships, but only to the extent of lessening the amount of punishment, with which this crime, supposing it to be proved, will fall to be visited. Great weight is certainly due to the opinion of Baron Hume, but as that opinion rests entirely on the very strange case of Elliot, I do not think that it affords us any certain guide in this case. Nor do I pay the smallest regard to the law of England. They have some strange distinctions in that law, and I do not know that we understand them. It is in consideration of the precedents in our own law, that I am willing not to dissent from the unanimous opinion of your Lordships on this point.

The Court accordingly repelled the objection stated to the relevancy of the Indictment, and, on the motion of the Solicitor-General, deserted the diet against the pannel *pro loco et tempore*.[1]

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[1] The pannel was tried before the Lord Justice-Clerk at the Dumfries Spring Circuit. The pocket-book containing L.113 or L.114, and also papers from which the finder must have immediately known to whom it belonged, was proved to have been lost on the night of the 28th of May, on the road libelled. Late that night, or early the following morning, the pannel travelled along that road with a companion, who observed that when near to Ecclefechan he complained that his feet were sore, and stopped and sat down by the road side, while the other walked slowly on. He had been that day liberated from jail, where he had been imprisoned for an assault. During the period of his confinement he was believed to have no money, but the day after his liberation he was seen with a pair of new shoes and a silk handkerchief, and shortly afterwards got several new suits of clothes. His uncle, James Johnstone, was examined for the prosecution, and detailed an agreement which took place between Smith's relations, according to which they were to divide the money which he had found. He stated that this division took place about 17 months after the pannel had found it,—that he himself went with his sister Janet Johnstone (who was since dead), to draw L.100 from the Commercial Bank at Annan, where it was deposited in her name,—that of this sum he (the witness), Janet Johnstone, Robert Milligan his sister's husband, Mary Smith, Peter Smith, Robert Smith, and his mother Mrs.

March 12 1836. JANET WHITTON or STORMONTH, Suspender.—*Robertson*—*Milne*

AGAINST

JAMES DRUMMOND, Respondent—*Neaves.*

SUSPENSION AND LIBERATION—FINDING LOST PROPERTY—OBJECTION OF INSUFFICIENT SPECIFICATION OF TIME AND PLACE.—A party having been senteneed by a police court to twenty days imprisonment, for having found a purse containing money at a certain place "shortly after it had been lost," and when "afterwards" asked to return it, having denied having found it, and appropriated the money to her own use, a bill of suspension brought on the grounds, (1.) that the offence charged is not a matter of criminal dittay, (2.) that there was no specification of the time when, or the place where it was committed—refused.

No. 9. Whitton v. Drummond. Susp. and Lib.

The Suspender, a shopkeeper in Dundee, was brought before the Sheriff of Dumfries, on a charge of having found a purse containing money, and appropriated it to her own use. The libel charged that the pannel, "on the 28th day of July last, or one or other of the days of that month, or of the month of June preceding, in the parish of Annan, or in the neighbourhood thereof, found a purse containing money, and shortly after it had been lost, and when afterwards asked to return it, having denied having found it, and appropriated the money to her own use." The pannel was found guilty, and sentenced to twenty days imprisonment. She then brought a bill of suspension, on the grounds, (1.) that the offence charged is not a matter of criminal dittay, (2.) that there was no specification of the time when, or the place where it was committed.

The Lord Ordinary refused the bill, and the pannel reclaimed

No. 9. Whitton v. Drummond. March 12 1838.

Susp. and Lib.

fore the police court there on the 18th January 1838, at the instance of the Respondent, as Superintendent of police and Procurator-fiscal. The complaint against her set forth " That upon Monday the 15th day of January " current, Agnes Young or Small, while passing along " at the West Port, Dundee, nearly opposite to Kermath's " buildings there, lost a purse made of blue cotton cloth " with white spots, which purse, when lost, contained " four one pound bank or bankers notes, her property, or " then in her lawful possession: That the said Janet " Whitton or Stormonth found the said purse and " money there shortly after it had been lost, and when " afterwards asked by the said Agnes Young or Small " to restore to her the said purse and money, she, the " said Janet Whitton or Stormonth, did fraudulently and " wickedly and feloniously deny having found the said " purse and money, and did appropriate the said money " to her own uses and purposes, and did thereby defraud " the said Agnes Young or Small of her property, the " value of the said purse and money not exceeding ten " pounds sterling." On the 22d of January the police magistrate, having considered the complaint, examined the defender, and heard and considered the evidence adduced, found the complaint proven; found that the value of the money and purse lost did not exceed L.10 sterling, therefore adjudged and ordained the defender to be imprisoned in the jail of Dundee *in modum pœnæ* for the space of twenty days.

Whitton, having been incarcerated under this sentence, presented to the Court a bill of suspension and liberation, on the following grounds. (1.) The offence upon which she was tried and convicted is not a matter of criminal dittay. If it is a crime at all, it must be theft, and not fraud, as it possesses none of the requisites of the latter offence. But the appropriation of lost goods has not hitherto been considered theft by the law of Scotland, more especially when, (as in the present case), the owner is unknown; and the charge in the complaint is not set

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forth as a case of theft. (2.) There is no specification of the time when, or the place where, the act complained of was committed. (3.) The proceedings against the suspender were irregular. She received no copy or note of the complaint on which she was to be tried. On three different days she was brought to the Police Office, and after being detained in custody for a considerable time, was dismissed; on which occasions no adjournment of the diet took place.

It was answered for the Respondent: (1.) The ends of justice are not to be defeated by the difficulty of affixing a name to a particular crime, if it be charged in an intellegible manner, and so as to set forth the criminality of the act. And if the charge against the suspender is not properly or necessarily theft, it is a species of fraudulent appropriation, falling under the general category or analogy of fraud or embezzlement, and clearly cognizable by the Police Court of Dundee.[1] (2.) The whole transaction is fixed as having taken place in three days at the utmost; for the charge, which is dated the 18th of January, sets forth that the purse was lost on the 15th, that the suspender found it " shortly after it had been lost," and when afterwards asked for it, denied having found it, and appropriated the money to her own use. And in regard to the *locus*, the place where the purse was lost is distinctly specified, and the suspender is stated to have found it *there*, which was all that could be done, the mental act of appropriating the money being an occult one, as to which the prosecutor was not bound to give any minute specification. (3.) It was not necessary that the suspender should receive a copy of the complaint

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[1] The Dundee Police act, (5th Geo. IV. c. 129), gives the Magistrates jurisdiction " in all complaints which may be made under this " act against any person or persons accused of theft, swindling, unlaw- " ful gambling, assault, rioting, breaking of the peace, or any such cri- " minal, riotous, or disorderly act, or any offence whatsoever cognisable " at common law, by any of the inferior Judges of Scotland without a " Jury."

against her. The several diets were not only adjourned by minute in the Court book, but by formal interlocutors subscribed by the Judge; and the sole reason why these are not included in the certified copies furnished to the suspender is, that the only record required by the statute is the complaint and sentence.

The case came to be advised this day.

ROBERTSON, for the Suspender, argued,—(1.) According to the decision already pronounced in the case of John Smith, (*ante*, p. 28.) the *species facti* ought to have been charged as theft, not as fraud. But the charge is not relevantly laid, even as a case of fraud. The lie upon which the essence of the crime is made to turn, is not a point of criminal dittay. (2.) There is no specification either of the time or place at which the fraudulent appropriation took place. It is merely set forth that the purse was found "shortly after it had been lost," and that "when "*afterwards* asked" to restore it, the suspender denied having found it, "and did appropriate the said money to "her own uses and purposes."

NEAVES, for the Respondent, answered,—(1.) Under whatever name the offence may rank, there can be no doubt that the concealing and appropriating found goods is a wrong thing, and a punishable thing. It has only this day been decided, that to do so, when the owner is known, is theft. It could not, therefore, be expected that this case should be libelled as such. But it is a principle in the law of Scotland, that the prosecutor is not obliged to have recourse to any *nomen juris*. Accordingly, the *species facti* are not charged as frand. The complaint does not contain any major proposition, and it was not necessary that it should do so. (2.) The goods were lost on the 15th of Japuary, and the complaint was presented on the 18th. This is therefore a sufficient specification of the *time*. And in regard to the *place* where the appropriation took place, it is impossible to state the *locus* of so occult a crime.

The LORD JUSTICE-CLERK.—I am much afraid that if we were to look at complaints of this nature with the

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critical eye with which we regard regular indictments, we should introduce a very dangerous precedent. Looking at the whole matter, considering the way in which the crime is set forth, and seeing the very short space of time between the loss of the articles and the date of the complaint, I do not think that any sufficient ground has been stated for sustaining the objections.

LORD MEADOWBANK.—I am very unwilling to differ, but I have very considerable doubts in the case. The ground of my hesitation is this, that whether persons are to be tried in the Police Court, or in the Sheriff Court, or any where else, they are entitled to have the facts so set forth as may enable them, if they think proper, to object to the jurisdiction. Now it is only by inference that it can be concluded, that the *locus delicti* here was within the bounds of police. However inconvenient, I must acknowledge that I am against relaxing the rule, which requires in every criminal charge a specification of the time and place at which the offence is said to have been committed.

LORD MACKENZIE.—I have a good deal of difficulty in this case. I do not think that there is anything in the first objection, that the offence ought to have been charged as theft. For he would have been a bold Superintendent who, while the law on that point was still unsettled, should have taken upon him to decide that the *species facti* set forth amounted to that crime. As to the other point, on which the opinion of Lord Meadowbank proceeds, I think the objection would apply with equal force to the case of Smith which we have already decided, for it was not set forth there, that the appropriation took place within the jurisdiction of the Court of Justiciary. On the whole, although I have very great doubts, I am inclined to agree with the Lord Justice-Clerk.

LORD MONCREIFF.—I confess that I also have very great doubts. I think, however, that there is a great deal in the argument, that this is not a regular Indictment. It was not necessary that there should be a major pro-

position, to which the *species facti* charged should correspond. All that the magistrate found was, that the complaint setting forth the loss of the purse and money, and the finding of them by the suspender, with her subsequent denial and appropriation of the money, was proved. I must guard myself from being supposed to hold, that a charge of this kind would be competent in this Court. If the *species facti* amount to theft, I do not think it can be relevantly charged as fraud. Then undoubtedly there is a difficulty, arising from the want of any *locus* as to the appropriation, which is the essence of the crime. As to the *time*, I do not think that, in the circumstances, there is any want of specification. But the *place* ought to have been particularly set forth, especially since upon it may depend the question, whether the Court had jurisdiction. On the whole, however, I am not prepared to say that the reasons of suspension ought to be sustained, and the crime suffered to go unpunished.

LORD COCKBURN.—I agree with Lord Moncreiff, that there is no sufficient specification of the place where the suspender is said to have appropriated the money. But I get rid of that difficulty, by leaving the appropriation altogether out of view. For I think the denial by the suspender of her having found the property, was a sufficient crime to bring her under the jurisdiction of the Court before which she was tried.

THE LORD JUSTICE-GENERAL having expressed his concurrence,

The Court repelled the objections to the regularity of the charge in the complaint, and before further answer, ordained the parties to produce the record of the original proceedings before the Police Court of Dundee.[1]

James Marshall, S.S.C.—Brown and Miller, W.S.—*Agents.*

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[1] The case came again before the Court on the 11th June, when without any additional argument, the bill was refused.

March 13
1838

Present,

LORDS MEADOWBANK, MONCREIFF, MEDWYN.

HER MAJESTY'S ADVOCATE—*Innes*—*Handyside*.

AGAINST

JAMES MURRAY—*Robertson Glasgow*.

PREVIOUS CONVICTION.—Question, whether a previous conviction before a Regimental Court Martial can be competently founded on.

No. 10. James Murray.

Theft, &c.

JAMES MURRAY was charged with Theft, aggravated by having been committed by a person who was habite and repute a thief, and had been previously convicted of Theft.

Among the previous convictions libelled on, was "an "extract, or certified copy of a conviction obtained against "the said James Murray, before a regimental Court "Martial, at Perth Barracks, for the crime of Theft."

A doubt having been expressed by the Court, as to the competency of founding on a conviction before a Court Martial,—

INNES, for the prosecution, declined to press the point, and consented to that part of the Indictment being struck out.

The pannel pleaded guilty.

In respect of which verdict of Assize, he was sentenced to be transported beyond seas, for the period of seven years.

Present,

March 19
1838.

LORDS MACKENZIE, MONCREIFF, MEDWYN.

HER MAJESTY'S ADVOCATE—*Shaw Stewart—Innes*

AGAINST

ROBERT WALKER.—*Inglis.*

SUBORNATION OF PERJURY.—OBJECTION OF TOO GREAT LATITUDE IN STATING THE TIME AND PLACE AND THE MODUS OPERANDI.—EVIDENCE.—RES JUDICATA.

1. An objection to an Indictment for Subornation of Perjury, that too great latitude was assumed, in stating the time and place at which the offence was committed, and the means of inducement held out, repelled.
2. A pannel having been acquitted on a charge of Theft, and being accused of having, on that occasion, suborned witnesses to commit perjury, it is competent, on his subsequent trial for the subornation, to prove that what the witnesses swore was false, even by evidence which establishes also the pannel's guilt of the theft, although that matter is properly *res judicata*.
3. Conviction on a charge of Subornation of Perjury. Sentence, transportation for seven years, with infamy.

No. 11. Robert Walker. — Subornation of Perjury.

GEORGE CRAWFORD, gardener in Paisley, and Peter Crawford his son, were charged with Perjury, and Robert Walker, farmer at Tirfergus, in the parish of Campbelltown, and county of Argyle, with Subornation of Perjury;

IN SO FAR AS, the said Robert Walker having been charged by Daniel M'Taggart, one of the Procurators-fiscal of the shire of Argyle, with the crime of theft, alleged to have been committed by him on or about the 11th day of October 1836, by his having stolen and theftuously carried away from a field on the farm of Tirfergus aforesaid, a quantity of bear in the sheaf or straw, the property, or in the lawful possession of John Smith, then the out-going tenant on the said farm; and the said Robert Walker having been apprehended and committed on a warrant granted by Dugald M'Tavish, one of the Sheriff-substitutes of Argyleshire, until he found bail to abide the issue of any prosecution which might be brought against him within six months, for the said crime alleged against him; and the said Robert Walker having been

No. 11. Robert Walker, March 19 1838.

Subornation of Perjury.

thereafter liberated on his consigning the sum of twenty pounds sterling in name of, or in place of bail, in the hands of one of the Sheriff-clerks of Argyleshire, and being conscious he would be brought to trial for the said crime alleged against him, and knowing his guilt in the premises, and that the said John Smith would be called as a witness against him, and having wickedly contrived a scheme to render inadmissible or impeach the credibility of the said John Smith when called or examined as a witness to prove his guilt of the said crime, by falsely alleging, and bring witnesses to give false testimony to the effect, that the said John Smith was actuated by malice towards him, and had, in concert with two of his, the said John Smith's servants, conspired falsely to accuse him of the said crime, the said Robert Walker did, on one or other of the days of the month of November 1836, the particular day being to the Prosecutor unknown, or on one or other of the days of October immediately preceding, or of December immediately following, and within the house situated in Glen street or Love street of Paisley, then and now or lately occupied by George Hutchison, public-house-keeper there, and within the house situated in Glen street of Paisley, then and now or lately occupied by the said George Crawford, or in one or other of these places, *or at some other time and place to the Prosecutor unknown*, wickedly and feloniously solicit, entice, seduce, and suborn the said George Crawford and Peter Crawford, and James Ballantyne, then residing in Paisley, and now or lately prisoner in the tolbooth of Inveraray, or one or more of them, to appear as witnesses in behalf of him the said Robert Walker at his said trial, and wickedly, wilfully, and deliberately to commit the crime of perjury, by falsely swearing to certain pretended facts, as to which the said Robert Walker was to give them particular instructions, as after-mentioned, before they were examined as witnesses on his behalf at his said trial, and this the said Robert Walker did, by holding out to the said George Crawford, Peter Crawford, and James Ballantyne, or one or more of them, the expectation of good deeds and rewards, and employment in his service, and by promising to them, or one or more of them, the sum of L.20 sterling or thereby, *or by other means of inducement to the Prosecutor unknown*: And the said Robert Walker having been served with notice to stand his trial, at the instance of the said Procurator-fiscal, before the said Sheriff-substitute at Campbelltown, on the 6th day of December, year foresaid, did proceed to Paisley, on or about the 2d day of December, year foresaid, and having brought therefrom, as previously arranged, the said George Crawford, Peter Crawford and James Ballantyne, to his house and farm at Tirfergus, where he lodged them, the said Robert Walker did there, on the night of the 5th, or morning of the 6th day of December, year foresaid, again, by the means aforesaid, wickedly and feloniously solicit, entice, seduce, and suborn the said George Crawford, Peter Crawford, and James Ballan-

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tyne respectively, wickedly, wilfully, knowingly, and falsely, to swear as witnesses in his behalf at his said trial, to certain pretended facts, according to instructions which he then and there gave to them; and in particular, to swear that they respectively had been at Tirfergus on the 11th day of October preceding, and had then respectively heard the said John Smith, and two of his men-servants, falsely accuse the said Robert Walker, and pretend to have caught him in the act of stealing and theftuously carrying away bear in the sheaf or straw belonging to, or in the lawful possession of, the said John Smith, from a field on said farm, although the said Robert Walker had not done, and was not doing so, and that thereafter they had then respectively heard the said John Smith and his said servants concerting together to accuse the said Robert Walker of the said alleged theft, when the said John Smith promised, or held out to his said men, a sum of L.5 as a reward if they would swear to the said Robert Walker's alleged guilt, and that they offered to do so if they got L.5 a-piece from the said John Smith, and which he agreed to give; and the said Robert Walker did solicit, entice, procure, and suborn, by means aforesaid, the said George Crawford, Peter Crawford, and James Ballantyne, falsely to swear in the above terms, or in similar terms, and to the same import, knowing that the said George Crawford, Peter Crawford, and James Ballantyne in so swearing would commit wilful and corrupt perjury: And the said Robert Walker having succeeded, by the means foresaid, in wickedly and feloniously soliciting, enticing, procuring, and suborning the said George Crawford, Peter Crawford, and James Ballantyne, to swear falsely as aforesaid; and they having concerted and agreed with him on the circumstances and details of the story which they should respectively tell when examined in court, the said Robert Walker thereafter had them precognosced in his presence by his agent, Colin Matheson, then and now or lately writer in Inveraray, on the morning of the said day fixed for his trial: And thereafter the trial of the said Robert Walker, having been proceeded with before the said Dugald MacTavish, on a libel raised at the instance of the said Daniel Mactaggart, for the said crime of theft, alleged to have been committed by him on or about the said 11th day of October, in stealing bear in the sheaf or straw, the property or in the lawful possession of the said John Smith, from a field on the farm of Tirfergus aforesaid; and the said John Smith having been adduced as a witness on the said trial for the Prosecutor, the said Daniel MacTaggart, and his evidence having been objected to, by, or on the part of the said Robert Walker, on the ground that he, the said John Smith, was actuated by malice towards the said Robert Walker, or on some other similar ground; and the said George Crawford having been cited, adduced, and examined on the said trial as a witness for the said Robert Walker in support of the said objection, the said George Crawford solicited, enticed, seduced, and suborned by

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the said Robert Walker as aforesaid, did, on the 6th day of December 1836, or one or other of the days of the said month, or of November immediately preceding, or of January immediately following, within the Court-house of the burgh of Campbelltown aforesaid, after having been solemnly sworn to tell the truth by the said Sheriff-substitute, wickedly, wilfully, knowingly, and falsely swear and depone to circumstances contrary to the truth, in the following or similar words, which were forthwith taken down and minuted by the said Sheriff-substitute, and read over to the said George Crawford by him at the time, and then admitted by the said George Crawford to have been correctly taken down :—
" George Crawford, gardener in Paisley, an exculpatory witness, cited
" for the accused, appeared; and being sworn, depones, That he is 41
" years of age and married: That, in October last, witness came to
" Kintyre with the view of engaging to perform some work for Robert
" Walker: And, about the 11th day of that month, witness called at
" Mr. Walker's house about 8 o'clock in the evening. Witness, on
" reaching Mr. Walker's door, rapped thereon, and, in consequence,
" Mr Walker came out of his house and shook hands with witness.
" Before entering the house, Mr. Walker said he wished witness to re-
" main at the pig-house, near the door, a little, as he, Mr. Walker,
" had occasion to go to a field at the end of his house to see that
" the cattle from the muir were not trespassing on his crop. Wit-
" ness saw Walker accordingly go into the field: That, after
" Walker went into the field, another man came off the road from
" near Mr. John Smith's house. From the conversation witness
" afterwards had with this man, witness thinks he was a servant of Mr.
" Smith's. This man immediately went into the field, and, approach-
" ing Mr. Walker, who was then quite near, said, ' you are taking away
" ' the barley, and what are you going to do with it ?' to which Walker
" answered, ' I am carrying away no bear,'—and witness did not see
" Walker with any bear in his hands at the time. Witness is certain
" Walker had no sheaf of barley in his hands at the time: That in about
" ten minutes or less, during which the man and Walker were arguing,
" the man called on another man who came in five or a few minutes
" after being thus called, out of the same house from which the first man
" had come. The second man appeared to be the tallest: that the se-
" cond man said very little; but what he said was to the same purpose
" with what the first man had said, that is, he also spoke of Walker hav-
" ing taken bear: that, while this discussion was going on, one of the
" men—witness thinks the first—called on Mr. Smith to come to the
" spot, and Mr. Smith accordingly came apparently from the same place
" as the other men had come from. When Mr. Smith came, witness
" gave more attention to what passed. Mr. Smith accused Walker
" nearly in the same terms used by the first man, saying to Walker,
" ' what are you going to do carrying away my bear; you are a pretty

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"'farmer?' Walker in answer, said, 'I am doing no such things.' "And, as already stated, witness did not see Walker have any bear in "his hands. Witness saw the two men each lift one or two sheaves "from the ground near where Walker stood, and carried them towards "Mr. Smith's byre or barn, and into one of these out-houses: that wit- "ness was all this time accompanied by Peter Crawford, witness's son, "and Thomas Ballantyne, labourer from Paisley; that after Mr. Smith "and the two men, whom witness, from this conversation, believes to "have been Smith's servants, went away towards Smith's houses, Mr. "Walker said to witness that he, Walker, suspected that Smith and his "servants were speaking of him, Walker, and that as he feared they "meant no good to him, he wished witness to try to hear what they "were saying. The witness, and his son, and Ballantyne in conse- "quence accompanied Walker through the latter's byre, in order that "without being seen, they might hear what Smith and his men were "saying: That Smith then said to his men, 'I would rather than L.5 "'that I could get Walker convicted, so as I might get back my farm.' "Smith also said, 'I will get the Lowland buggar transported.' Smith "also mentioned the factor, with whom he said he was very gracious, "and that he hoped he would get back his farm, if he could get Walker "transported, or at least sent back to the low country: That the men "who were with Smith, each said, that they would swear to Walker's "guilt if they would get L.5 a-piece, and this 'although Walker was "'not guilty.' That after hearing this conversation, witness, and his "son, and Ballantyne returned to Walker's house, and 'stopped till "'next morning:' That next morning about gray day light, just after "witness got up, he was standing with his son and Ballantyne in the "close, and saw a man whom witness believes to be Walker's servant, "carrying a small pickle, about half a sheaf of oats or barley, into Mr. "Walker's stable: That the man who carried this pickle was called M'- "Millan, at least witness thinks Walker addressed him by that name on "the previous night in the house. Witness did not see the man leave "the stable after going into it in the morning: That Walker was not "then out of his own room: That witness left Mr. Walker's after getting "breakfast on the same day, which witness thinks was Wednesday. In- "terrogated for prosecution, witness has this day seen Mr. Smith in the "witness's room, but his dress is changed, as on occasion of seeing the "person of that name in the field; on the evening in October, Mr. "Smith wore a jacket and trousers. Procurator Fiscal having called "Neil M'Millan, and Daniel M'Kinlay, witnesses for the prosecution, "into Court,—The witness identified M'Millan as being the person he "saw taking bear or oats into Walker's stable in the morning, and whom "witness had also seen as a servant in Walker's house the preceding "evening: That witness cannot say that Neil M'Millan and Daniel M'- "Kinlay were the men that were with Smith, in the field on the even-

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" ing of witness's arrival at Walker's: That when witness, and his son, " and Ballantyne accompanied Walker to overhear the conversation be- " tween Smith and his servants, the witness and those with him went " through two byres, and they were at a laigh door in the third byre, " opposite to Smith's large thatch house in which Smith resides: That " the door of the byre at which witness and the other parties stood with " Walker, fronted Smith's row of houses: That Smith and his men stood " near his house, and rather on the left hand side of witness and the " others listening: That there was a door in Smith's house, rather farther to " the left of the witness than the spot at which Smith and his men stood, and " the latter might be from one to four yards from the front of Smith's house; " witness does not know the distance between Smith's front wall and " the door at which witness was listening; but witness thinks Smith " and his men stood nearer his own house than the byre-door at which " witness was listening: That it was near nine o'clock; and witness " heard Smith and his men better than they were seen. The door " witness was at was open at the time: Cannot say whether Smith " and his men could have seen witness and his party, as people within " a dark door are not so easily seen as in the street: Cannot say if " the moon was up at the time; but does not recollect to have seen " the moon that night. Does not know if it rained while he was " listening; but he felt no rain where he stood: That witness got " only one dram, and it was of a white colour, from Walker that night; " but he did not see either his son or Ballantyne get any dram that " night: That witness got no dram from Walker in the morning. " Witness went home in October, after leaving Walker's house, and " came here to-day, in consequence of a summons to attend this court. " Witness does not know if Walker went lately to the low country to " bring the witness here; but Walker was lately in the low country: " That witness had no conversation with Walker about this case since " the citation was given: That all Walker said to witness was to tell " the truth, the whole truth, and nothing but the truth; just the same " as the witness has this day deponed to. Walker did not promise " any thing to witness for coming here; nor did he, in witness' presence, " make any such promise to any of the other witnesses. Being specially " interrogated, if witness heard Smith say, ' that he wished to get " Walker, the Lowland buggar, transported?' Depones, That witness " has already sworn to this expression. Depones, That he does not " know if Smith is a Lowlander or a Highlander; but he resides in " the Highlands. Witness saw Walker's servant carry a small pickle " of bear or oats in the straw into Walker's stable; but witness cannot " say where the servant got the bear or oats. Does not know if " Walker had, or had not any crop of bear or oats of his own at " the time. Interrogated for the defender, Depones, That the person " who was addressed in the field as Mr. Smith, on the evening

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"in October that witness arrived at Walker's, was dressed in a blue "jacket and trousers, and about five feet ten inches in height. And "Mr. Smith, a witness for the prosecution, being called into Court, "witness cannot identify him by his face; but thinks the height the "same with that of the man who was addressed as Mr. Smith on the "evening deponed to: That it was dark at the time witness saw Mr. "Smith that evening:" Whereas the truth is, and it will be proved that the facts so sworn to by the said George Crawford are false, and were known by him at the time to be false; inasmuch as it will be proved that he was not in Kintyre at or about the time specified by him; and, in particular, that he was not at the house, nor on the farm at Tirfergus aforesaid, then occupied by the said Robert Walker, on or about the 11th day of October 1836, and did not see or hear any of the circumstances deponed to by him, as having then and there taken place: As ALSO, the said Peter Crawford having been likewise cited, adduced, and examined on the foresaid trial, as a witness for the said Robert Walker, in support of the said objection, the said Peter Crawford solicited, enticed, seduced, and suborned by the said Robert Walker as aforesaid, did, Time and place last above libelled, after having been solemnly sworn to tell the truth, by the said Sheriff-substitute, wickedly, wilfully, knowingly, and falsely swear and depone to circumstances contrary to the truth, in the following or similar words, which were forthwith taken down and minuted by the said Sheriff-substitute, and read over to the said Peter Crawford by him at the time, and then admitted by the said Peter Crawford to have been correctly taken down: "Peter Crawford, son of the preceding witness, aged fifteen, "not married, Depones, the deponent and his father, and James "Ballantyne, came to Kintyre, on the 11th or 12th of October last, "in the hope of getting a job of work from the defender, at whose "house the party arrived about eight o'clock in the evening: That "deponent's father knocked at Mr. Walker's door: That Walker "himself opened the door, and coming out of the house, he said he must "go to see if any of the queys had come down from the muir, as he "alleged that they had been in the barley: That witness and his "party went to the swine-house, at the gable of Walker's house, along "with Walker, who left witness and party, and proceeded farther into "the field at the gable of the house, but keeping in sight of witness "and party: That as Walker was returning towards witness and "party, after being about, and not more than two minutes in the field, "another man came up from the side of the road into the field: That this "man said to Walker, 'What are you doing with that bear?' to which "Walker answered, 'I am neither making nor middling with the bear.' "Then the man cried on another man, who came from the same "direction that the first man had come from: That this might "be five, and certainly not more than ten, minutes after the first man "had entered the field: That the second man had very little conver-

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"sation with Walker and the first man, before one of these men cried "on Mr. Smith: That in consequence of this call, a third person, "whom the witness did not hear make any answer to the call before he "appeared, came up to the field, but witness supposed he must be Mr. "Smith, from his coming after that name was called: That Mr. Smith "immediately on entering the field said to Mr. Walker, 'You are a "pretty farmer, stealing my bear:' That Walker answered, 'I am "neither making, nor middling, nor touching your bear.' Did not see "Walker touching or middling with any of the bear; and if he had done "so witness must have seen it, as he was in sight all the time: That "after Mr. Smith, as he was called, and the two men went away, wit-"ness and his father and Ballantyne accompanied Walker into the "house of the latter, but previously witness observed one of the men "with Smith lift and take with him a few sheaves of bear out of the "field: Witness did not see where the man took the bear, as witness "did not see the man go into any of the houses: That after witness "and party entered Walker's house, he led them through two byres into "a third, being the downmost, at the door of which witness and party "heard Smith saying, 'he would give L.5 if he could get Mr. Walker "convicted, or if he could get any man to swear Walker stole this bear,' "on which one of the men with Smith said, 'If you will give us L.5 a-"piece we will swear Walker stole the bear, and that we saw him do "so:' That Smith afterwards said he would give the men the L.5 "a-piece, and that he would get Walker transported, after which he "would get the farm, as he had been speaking to 'the factor' about it: "That Smith described Walker as a Lowland buggar, and said he should "be sent home to the place he came from: That witness and his father "and Ballantyne lodged that night in Walker's house: That witness "did not see any person carrying bear or oats into Walker's stable, as "witness was not present at the time. Interrogated for the pro-"secution.—Has seen Mr. Smith this day in the witness' room, "and he has also seen in the same place two men who are "said to be Smith's servants, but witness cannot identify either "Mr. Smith, or the men as the parties he saw in the field at the end "of Walker's house on the evening above deponed to, nor can witness "say that he ever saw the men before this day. Rather thinks Smith, "on the evening alluded to, had on a long coat, but witness cannot be "certain as to this: That it was Walker who asked witness and his "father and Ballantyne to accompany him to the downmost byre to "hear 'what they were saying,' that is, Mr. Smith and the two men "who had challenged Walker: That Smith and the men were speaking "at the time, not very loud: That the men had not the bear with "them at the time that witness knows of: That Smith and his men "were at the time standing a little below the byre-door at which "witness was listening in the inside: That witness did not at the "time see the men 'ava,' but he kent by their voices 'that they must

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"be standing a little below the byre-door:' That there was a row of "houses opposite the byre-door, at a distance hardly as broad as the "street before the court-room window: That there was no dunghill "before the byre-door, but there was a midden down at the end of "the houses on the left hand from the byre-door: That from the byre-"door, the midden-stead would be seen on the left-hand side. Could "not say where Smith and his men were standing when witness in the "byre heard them speaking, but witness thinks they must have been "standing farther down than the byre-door, and towards the midden. "Is certain witness did not see Smith and his men at the time he was "listening: That Walker was nearer the door than witness, but "witness can't say which of his party stood next to Walker. Does not "know if Smith and his men could see witness and his party when they "were listening. There was no door in the byre: That witness did "not see Smith and his men at the time, but he thinks the sound of "their voices came from the down-side of the barn. Depones, That "witness cannot say whether the sound of the voice scame from the "right or the left side of the byre-door, as witness was ill of a fever "'no lang syne,' and has been a little deaf since: That if witness had "seen Smith and his men at the time he would have judged better: "That witness thinks the voices came from the left-hand side of the "byre-door, which is the down-side, but of this he cannot be certain: "That witness is far better at the hearing now than he was then. "When listening to Smith and his men, witness thinks he "observed a door in front of Smith's house, but does not remem-"ber whether the door lay to the right or to the left of the byre-door "within which witness stood. Did not see Smith and his men between "witness and the door, as he was not paying attention to it. If Smith "and his men were within four yards of Smith's door, witness could "have heard them where he stood. Being told that the street opposite "the court-room window is nineteen yards wide, depones, that he thinks "he could hear men speaking within four yards of the opposite side. "Witness thinks Smith and his men, when overheard, were nearer "Smith's house than to the byre, and he forms this opinion from the "way they were speaking at the time: That it was not raining at the "time. Depones, that witness and his father left Walker's house about "day-light in the morning. Depones, that witness got a dram from "Walker in his father's presence the night they arrived at Walker's. "Depones, that witness has been at Paisley ever since he left Tirfergus, "till he came away to attend this Court: that Walker came to Camp-"belltown in the same steam-boat with witness yesterday, or rather this "morning at two o'clock. Interrogated for defender, depones, that wit-"ness and his father and Ballantyne were on the outside of Walker's kit-"chen door, at the time he asked them to accompany him to listen to "what Smith and his men were saying; and the witness, and his father,

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"and Ballantyne, with that view entered the kitchen door, and passed "through the two byres into the lower byre, at the door of which they "heard Smith and his men distinctly. Is certain that the voices wit- "ness heard in the byre-door were the identical voices he had previous- "ly heard in the field at the gable of Walker's house. Witness cannot "positively swear that his father was present at the time witness got the "dram in Walker's house. Does not recollect in what part of the house "the dram was given, but it was from Mr. Walker's hand. Depones, "that when witness listened to the voices at the barn-door, witness saw "no person from whom the voices proceeded, but is certain the voices "were the same he had just heard in the field at the gable of Walker's "house." Whereas the truth is, and it will be proved, that the facts so sworn to by the said Peter Crawford, are false, and were known by him at the time to be false; inasmuch, as it will be proved that he was not in Kintyre at or about the time specified by him; and in particular, that he was not at the house, nor on the farm at Tirfergus aforesaid, on or about the 11th or 12th day of October 1836, and did not see or hear any of the circumstances deponed to by him as having then and there taken place: As ALSO, the said James Ballantyne having been likewise cited, adduced, and examined on the foresaid trial, as a witness for the said Robert Walker, in support of the said objection, the said James Ballantyne, solicited, enticed, seduced, and suborned by the said Robert Walker as aforesaid, did, time and place last above libelled, after having been solemnly sworn to tell the truth by the said Sheriff-substitute, wickedly, wilfully, knowingly, and falsely swear and depone to circumstances contrary to the truth, in the following or similar words, which were forthwith taken down and minuted by the said Sheriff-substitute, and read over to the said James Ballantyne by him at the time, and then admitted by the said James Ballantyne to have been correctly taken down:—"James Ballantyne, labourer in Paisley, "aged nineteen, not married, depones, That deponent is sure that on "the 11th of October last, the witness and George and Peter Craw- "ford came to Mr. Walker's house in Tirfergus in search of "a job of work: That, on knocking at the door, it was opened by "Walker himself, who desired witness and his companions to stay "there a minute or two until he looked if any of the queys had come "out of the muir: That, on this, Walker come straight out of the "door, and went into a field at the gable of his own house, to which "witness and his companions followed Walker as far as a pig-stye at "the gable. After going a short way into the field, Walker, on being "satisfied there were no queys there, hurried back again towards the "witness, and when he came within a few yards of them, a man came "into the field from the road-side, and took hold of Walker, asking "'What he was going to do there, and what he was doing with the "'bear:' to which Walker answered, 'that he was not touching the

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"'bear:' That witness and his companions saw Walker all the time he "was in the field, which was not two minutes before he was attacked "by the man: That Walker, though he passed through the stooks, did "not touch any of them; and if he had touched them, witness must "have seen him: That the man who attacked Walker called on ano- "ther man to come into the field: That, in consequence, another man "came into the field: That this person said little; but he and the "first person continued to argue with Walker for a few minutes, after "which one of the men cried for Mr. Smith: That the first man had "disputed with Walker from five to ten minutes before he called in "the second man: That a person who was addressed as Mr. Smith, "came into the field after that name was cried: That Smith said to "Walker, 'You are a pretty like farther.—What are you going to do "'with the bear?' to which Walker answered, 'I was not touching "'the bear.' After the parties argued a few minutes, they dispersed, "Walker and the witness, with the Crawfords, went into Walker's "kitchen-door, and thence passed through two byres into a third "and stood in the latter, and harkened a little to Smith, who was at "the time near the door of his own house, speaking to the two men "who had called him into the field. Witness heard Smith say he "would give L.5 if the men would swear that Walker had stolen "the bear, on which one of the men answered that, if Smith would "give them L.5 a-piece, they would swear as he wanted. On which "Smith said, 'it was a pity but they could get the Lowland buggar "'out of the country:' That, while the witness was listening, Walker "told witness that it was Smith who said he would give L.5 for the "testimony against Walker. Heard Smith say, that as he was in very "'good agreement with the factor, he would get his farm back again "'if Walker were put away.' Depones, That next morning witness "saw a man carrying a pickle bear in the straw into Walker's stable: "That this man was not a minute in the stable, before he walked out "towards Mr. Smith's house. Depones, That before the parties "left the field at the gable of Walker's house on the evening, witness "saw one of the men who went away with Smith lift two or three "sheaves of bear, and carrying them out of the field, but witness "does not know where he took them: That witness and the "Crawfords lodged in Walker's house that night, and left it next "day in the morning before breakfast. Depones, That the man "who said if Smith would give the men L.5 each, he would swear to "Walker's guilt, whether he was guilty or not. Depones, That wit- "ness would not be sure, from the conversation between Smith and the "two men, that the latter were Smith's servants. Interrogated for pro- "secution, depones, The witness has this day seen a Mr. Smith in the "witness-room, but cannot swear that this is the same Smith whom the "witness heard speaking on the night before deponed to. Witness left

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" Paisley on Monday, 10th October, and reached Tarbert that night. " Next night he reached Walker's in Tirfergus; heard George Craw- " ford tell this day, before he came to the court, that it was on Monday " the 10th October that witness left Paisley to come to Kintyre. " Witness embarked in the steam-boat for Campbelltown yesterday at " Renfrew Ferry, at nine o'clock morning, and reached Campbelltown " at two o'clock this morning, after which he went to Mr. Walker's " house at Tirfergus, where he lodged with the Crawfords, and that " they all breakfasted there this morning before coming to town to " attend this court. Depones, That witness does not know any person " who saw witness or the Crawfords at the time they were in Kintyre " in October last: That witness and his companions, when coming to " Tirfergus in October last, left an umbrella, nearly new, in a house on " the road side. Depones, That when witness came from Tarbert to " Tirfergus, the sea was on the right hand side of the road, and when he " returned the sea was, of course, on the left hand, as he returned by " the same road he had travelled in coming: That the house in which " witness left his umbrella was on the left hand side of the road in com- " ing to Tirfergus, and it was a woman ' who gave witness the liquor:' " Was in liquor on the road, but was sober when he reached Walker's; " got no dram at Walker's, nor did he see the Crawfords get a dram " there; got porridge and milk first, and tea afterwards, before leaving " Walker's this morning: That on the morning of 12th October, how- " ever, witness got no breakfast, or any thing whatever before leaving Wal- " ker's; got some bread and cheese in Tarbert for breakfast that morn- " ing: did not enter any house on the road from Tirfergus to Tarbert, " until reaching the latter at four o'clock, except the house in which the " umbrella was left. Left Tirfergus about eight o'clock in the morn- " ing, and trotted or run the whole way to overtake the boat—left " Tarbert next morning. Depones, That witness and his companions " were standing in the inside of the byre-door, at the time they over- " heard the conversation between Mr. Smith and his men: Witness " saw the three men nigh hand opposite to Mr. Smith's dwelling-house " door, and opposite to the byre-door; does not know the distance be- " tween Mr. Smith's door and the byre-door: That Mr. Smith's dwell- " ing-house door is rather below the byre-door, and consequently is to " the left of a person looking out of the byre-door: That the persons " witness heard, when in the byre, were more to the right of the byre- " door than Mr. Smith's dwelling-house door: That the men, while " talking, were certainly on the right hand side of the byre-door: " That there is a dunghill down below Mr. Smith's dwelling-house " door; and as this dunghill is below the dwelling-house door, the men, " when speaking, were on the other side, or upper side, of the dwell- " ing-house door." Whereas, the truth is, and it will be proved, that the facts so sworn to by the said James Ballantyne are false, and were

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known by him at the time to be false; inasmuch as it will be proved that he was not in Kintyre at or about the time specified by him; and, in particular, that he was not at the house, nor on the farm of Tirfergus aforesaid, on or about the 11th day of October 1836, and did not see or hear any of the circumstances deponed to by him as having then and there taken place: And the said Robert Walker caused the said George Crawford, Peter Crawford, and James Ballantyne, to be respectively cited, adduced, and examined as witnesses in his behalf at his said trial, in support of his said objection to the said John Smith, although he well knew that, solicited, enticed, seduced, and suborned by him as aforesaid, they intended to give false evidence in his favour, and to commit wilful and corrupt perjury, by swearing that they were respectively at the house, and on the farm of Tirfergus, on or about the 11th day of October 1836, and saw and heard the circumstances deponed to by them respectively, as having then and there taken place, when, as was well known to the said Robert Walker, they were not there at that time, and did not hear or see any of the circumstances deponed to by them respectively, as having then and there taken place.

The diet having been called against George and Peter Crawford, and they having failed to appear, sentence of fugitation was pronounced against them.

INGLIS, for the pannel Walker, objected to the relevancy of the Indictment, that too great latitude was assumed, both in regard to the time and place at which the pannel was alleged to have suborned the Crawfords and Ballantyne, and as to the means of inducement which he held out to them.

SHAW STEWART, for the prosecution, answered, (1.) The crime charged is of an occult nature, in which such a degree of latitude must be admissible, as is always taken, in regard to *place* at least, in forgery. (2.) Even in a charge of murder, the prosecutor is always allowed, after stating the *modus operandi*, so far as known to him, to add the words, " or by some other means to the prosecutor unknown."

LORD MEDWYN.—I am for repelling the objections, though I do not think that the analogy contended for between this case and a case of forgery holds.

LORD MONCREIFF.—I am clearly of opinion, that from the nature of the crime, the latitude taken must be allowed.

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LORD MACKENZIE.—If it should turn out, that the prosecutor has much greater information than he has chosen to give the pannel, that would be a material circumstance; but I do not think the latitude assumed is too great.

The objections were accordingly repelled, and the pannel pleaded not guilty.

EVIDENCE FOR THE PROSECUTION.

DUGALD M'TAVISH, *Sheriff-substitute of Argyleshire for the district of Kintyre.*—I know the pannel. I identify the petition and warrant on which he was committed to jail on a charge of theft on the 12th October 1836. He was liberated, on bail, on the 20th October, and afterwards tried before me, in the summary form, on the 6th of December. I identify the petition or libel on which he was tried. I took notes of the evidence, which I now identify. The first witness called was John Smith, whose bear was said to have been stolen by the pannel. An objection of malice was stated against him, of which I allowed a proof, and the pannel adduced, as witnesses, George Crawford, his son Peter, and James Ballantyne. I took notes of what they said almost *verbatim*. I read over their answers aloud to them. They were duly sworn. The agent for the pannel was Mr. Matheson, assisted by his son. (Here the witness read his notes of these three persons evidence as contained in the Indictment.) I saw Ballantyne here to-day. Smith, whose bear was said to have been stolen, emigrated at Whitsunday last. His two servants, Neil M'Millan and Daniel M'Kinlay, are here.

LACHLAN M'ISAAC, *Sheriff-clerk-depute of Argyleshire for the district of Kintyre*, corroborated the preceding witness, as to the circumstances of the pannel's trial for theft in December 1836. The notes taken by the Sheriff contain a correct statement of the evidence of the two Crawfords and Ballantyne.

Cross-examined by INGLIS *for the pannel.*—The Sheriff read each answer as it was taken down, openly, and in the presence of the pannel.

COLIN MATHESON, *writer in Campbelltown.*—I was employed by the pannel to defend him on a charge of theft. He applied to me on the 13th of October, to present a petition for his liberation on bail. I was also consulted by him as to his trial. He gave me a list of exculpatory witnesses. There were three in particular, George Crawford and his son, and James Ballantyne. I got a warrant for citing them, and gave it to the pannel to take to Renfrewshire. I gave him executions with blanks against these witnesses; and instructed him to apply to a writer in Johnstone to get them executed. He returned with the executions

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imperfectly filled up, not having gone to the man-of-business as directed. This was on the day of trial. He called at my house, and told me he had three witnesses; and called them in severally to be precognosced. I think he was present while I precognosced them. At the trial I objected to John Smith, on the ground of malice. The two Crawfords told the same story as they had done when I precognosced them. Ballantyne, on cross-examination by the Procurator-fiscal, seemed to prevaricate. He was examined as to his route from Paisley, on which the Crawfords were not examined.

Cross-examined by INGLIS *for the pannel.*—The evidence of the Crawfords was substantially the same as their precognition. So was Ballantyne's, till he was cross-examined. I never saw them till that morning. Ballantyne, on his cross-examination, did not seem to know his route from Paisley. I asked them no questions as to their route. Therefore Ballantyne's evidence did not differ from his precognition. He only appeared to prevaricate. The pannel said nothing during the precognition. He sat at the fireside.

By the COURT.—The pannel said that the Crawfords and Ballantyne were out of employment, in Paisley, on the 11th of October, and had come to him for work. This he told me on the first of December. He did not say that they had ever been there before.

JAMES BALLANTYNE, *labourer in Paisley.*—I know George and Peter Crawford. I was with them in Hutchison's whisky shop, at the foot of Glen street and corner of Love street, Paisley, when we met the pannel. He began talking about some bear, and about his having to answer in Court; and said he would give the Crawfords and me L.20, if we would go and clear him of stealing the bear. He was to come for us, and a fortnight afterwards, I was served with a summons to appear before the Sheriff Court at Campbelltown. I was away with a boat to Port Dundas, and when I came home on the Saturday night, I found the summons. I went to the Crawfords, and they said they were to go on the Monday. I saw the pannel on the Sunday at the Crawfords' house. He sent out for liquor. Crawford's house is nearly opposite Hutchison's. I was there when the pannel came in. We talked about meeting him at half past five next morning, to go in the boat, and perjure ourselves to clear him. The first day that I met the pannel at Hutchison's, I was working at Laird's Foundry, and Peter Crawford came to me, and said there was a gentleman at Hutchison's who wanted us to go to work with him. I went to Hutchison's, and the pannel laid off the whole story to George Crawford. The pannel said to George Crawford that he would give him L.20, and let us divide it, if we would go to Campbelltown and clear him of stealing the bear. He said this bear was said to be stolen from a Mr. Smith, a farmer who lived beside him. He said he would show us the place, and we were to say that we were in his house on the 11th of October, and that we

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saw him coming out of the house, and going to a field, to see if there were any cattle among the bear, and that we saw M'Millan and another man come into the field and seize the pannel, and ask him what he was doing with the bear. We were to say that we did not see him touching any bear, and that the pannel and Mr. Smith's men agreed about this, and that after we left them, we returned to the pannel's house, and went through the stable, to hear what Smith said to his servants. We were to say that Smith too came to the field, and said the same as the others. This conversation passed both at Paisley and at Tirfergus. The story was told to us at Paisley, and when we were at Tirfergus, we were shewn the places. The pannel told us at Paisley that we were to say, that Smith offered his men L.5 if they swore against the pannel, to get him banished from the farm, and that the servants replied, that L.5 would not do, but L.5 a-piece would do. I agreed with Crawford to go, and we were to share the L.20. The pannel said the L.20 was his bail, and he was to get it when clear. Our last conversation was on the Sunday. We met the pannel on the Monday morning, and all embarked by the Rover, at Renfrew Ferry. When we got to Campbelltown, we went to Tirfergus, where we spent the night. It would be nearly three, or four o'clock on Tuesday morning, when we got to Tirfergus. I had never been there before. We rose early, and were taken to see the places spoken of. The pannel again told us what to say at the trial. We all agreed as to the story we were to tell. We went to Mr. Matheson's at Campbelltown, and were examined by him. The pannel was present, and heard our story. He said something to Mr. Matheson, to bid him put our words right, but Mr. Matheson bid him hold his peace. We went afterwards to the Court, and were put into the witnesses-room. George Crawford was called first—then his son—and then I. I told the story as I had told it to Mr. Matheson, and as the pannel had instructed me. This story was false. On the 11th of October I was working at Laird's Foundry, at Paisley. The Sheriff took down my evidence, and read it over to me. I was sworn. The pannel spoke in the morning about giving us the L.20 to divide. Crawford said he would give him back L.5. The pannel said, no—he would give us more after the case was settled.

Cross-examined by INGLIS *for the pannel.*—The pannel said nothing to me while Mr. Matheson examined me. He brought me there, and the Crawfords with me. We went into Mr. Matheson one by one. I cannot say when we went to see the places. It might be seven or eight o'clock. There were men working in the field at the back of the pannel's house—lifting corn or bear. We did not speak to them. They might be a hundred or two hundred yards distant. I never saw the pannel before the day on which we met in Paisley. I believe George Crawford knew him before. On the Saturday night, when I went to Crawford's, I asked when they were going, and said I would

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not go. Crawford answered that there was no danger, and bid me not be afraid. I don't remember the first thing the pannel said to me. He spoke to me, but not about "*it*,"—by which I mean the case. I do not remember the first thing he said to George Crawford in my hearing. The story was not written. The pannel wrote down our names. I was instructed by the pannel, and after he went away, by the Crawfords. I remembered the story perfectly on the day of the trial. I got a share of a pound note which George Crawford got. I never asked for the money, for the pannel said he could not give it till the case was settled. We dared not return to Campbelltown that night, because a warrant was out against us for perjury. I never asked Crawford for money, but I went to Rutherglen, and got at different times two shillings, and one shilling, and threepence, from the pannel's son. I asked for more, but he said his father did not allow it, and therefore he could not give it. Laird is a founder. I was not constant with him. I work commonly with the steam-boats. I have never been tried, but was once in jail on suspicion of stealing lead. I do not recollect when this was, but it was a long time ago. I stated no objections to this perjury at the time. I was never concerned in such a thing before. I had no objections to it at first, though I knew it was wrong. When we came to Renfrew Ferry we met the pannel's son, and on stopping at Greenock I said I did not like going to such business, and the pannel's son told me not to be afraid.

FLORA M'NEILL, *lately servant to the pannel.*—I was in the pannel's service in October 1836. I remember the night on which he was accused of stealing bear. I was then sleeping in his house. I saw no strangers in the house that night or the next morning. I remember the trial of the pannel before the Sheriff. I saw the witness Ballantyne that day. I had never seen him at Tirfergus before. I remember George and Peter Crawford being examined at the trial. I had never seen them before, and in particular I did not see either them or Ballantyne at Tirfergus the night on which the theft was said to have been committed.

Cross-examined by INGLIS *for the pannel.*—I went to bed about nine o'clock that night. I did not hear of the accusation against the pannel, till the afternoon of the next day. After the pannel was liberated on bail, I heard his wife say, that it was a good thing that there were persons about the house who saw him that night. I saw both my master and mistress the morning after the alleged theft, but I did not hear them speaking upon the subject, or of three men having been there that night, till after the pannel was liberated on bail.

JOHN M'NICOLL, *lately in the pannel's service.*—On the 11th or 12th of October I heard of the pannel being accused of stealing bear from Smith. I slept in his house at that time. I saw no strangers in the house on the night of the alleged theft. I slept in the kitchen, and

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Flora M'Neill also slept there. I saw the two Crawfords and Ballantyne at the trial. I had never seen them before. I heard of the accusation against the pannel the following morning. I generally rose about six o'clock in the morning, and went to bed about eight. I heard the pannel, some days before the trial, say that three men were in his house on the night of the alleged theft. I never heard of three men who were to come to work for the pannel at that time.

JOHN PATERSON, *farmer in Euster Walkinshaw, Renfrewshire.*—I employed George Crawford in October 1836. He left my employment on the 6th of October, and went to Mr. Gibson at Brownsfield. I employed him for one day after that, but I am not sure whether it was during the following week.

JOHN GIBSON, *farmer in Brownsfield, Renfrewshire.*—George Crawford came to my service on Friday the 7th of October 1836. He was absent for some days during the following week. He was three weeks altogether in my service. He went one day to work at Paterson's. I cannot say whether this was during the week following his entry into my service. He was two or three days absent, either that week or the next. He was away both weeks on the Monday, but I cannot say during which week he was absent for two or three days.

By the COURT.—He never quitted me with the intention of not returning. He only came to me for a day or two, to sort the garden. He never asked leave of absence, or said he was going to look for other employment.

ELIZABETH ADAM or BROWN, *widow, residing in Love Street, Paisley.*—I know George and Peter Crawford. They lived beside me. I was intimate with the family. I also know James Ballantyne. I have seen the pannel in Crawford's house. I remember George Crawford, his son, and Ballantyne going to Campbelltown. They left Paisley on a Monday morning, and returned on Thursday. They said they were going with the pannel, and I saw them all pass the window together. I think this was in the beginning of December. I never heard of Crawford or his son being at Campbelltown before. If they had been there, I think I should have heard of it.

NEIL M'MILLAN, *residing in Campbelltown.*—I was in the service of John Smith at Tirfergus, in October 1836. Smith is now in America. The pannel was to enter to Smith's farm. Smith had an outgoing possession of the houses. I remember Smith missing some bear, in consequence of which a watch was set on the farm.

INGLIS, for the pannel, objected to any questions being put to the witness, in regard to the pannel's alleged concern in the theft, his innocence of which was *res judicata*.

The Court repelled the objection, on the ground that

every thing could be proved, which went to show that the story told by the witnesses, on the pannel's trial, was false.

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THE WITNESS.—I and Daniel M'Kinlay watched the farm on Tuesday the 11th of October. Smith remained near at hand. We saw the pannel go into a field, and take four sheaves of barley. M'Kinlay called out to catch the thief. I being nearest, ran and caught him with the sheaves in his possession. We called on Smith, who came forward. The pannel was charged with the theft, and his trial came on at Campbelltown. I saw the two Crawfords and Ballantyne at the trial. I did not see them on the night of the theft, nor had I ever seen them at all before the trial. Smith did not ask M'Kinlay or me that night to be witnesses against the pannel, nor offer us L.5 for being so. Neither Smith nor any one else ever proposed this. Nor did I ever propose to give any false evidence against the pannel.

DANIEL M'KINLAY, *sometime servant to John Smith*, exactly corroborated the preceding witness.

DANIEL M'TAGGART, *Procurator-fiscal at Campbelltown.*—I recollect the pannel being apprehended on a charge of theft, and admitted to bail. He deposited L.20, L.10 in cash, and a bill for the remainder.

SHAW STEWART, for the prosecution, having addressed the Jury,

INGLIS, for the pannel, answered,—It is very unlikely that three persons, in the situation of the accused, should have concocted so ingenious a defence. The principal witness is one who comes forward to declare his guilt of perjury. No direct communication between him and the pannel has been proved; and his evidence is not corroborated, as it might have been, by his master, Mr. Laird. If he was not at Tirfergus on the night in question, he cannot know whether or not the Crawfords were there. There is no sufficient evidence that they were not. Mr. Gibson's evidence rather goes to prove that they were; and there is no proof to the contrary, except the statement of the pannel's servants, M'Neill and M'Nichol, who went to bed at eight or nine, and rose at six, when the parties had left the house.

The Jury, by a large majority, found the pannel guilty.

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In respect of which verdict of Assize, he was decerned and declared to be infamous, and incapable of holding any public trust or office, or of passing upon any inquest or assize, or of giving evidence in any Court of Justice in all time coming; and further, sentenced to be transported beyond seas, for the period of seven years.

NORTH CIRCUIT.

Spring 1838.

INVERNESS.

April 14 1838.

Judge.—LORD COCKBURN.

HER MAJESTY'S ADVOCATE—*Shaw Stewart*

AGAINST

MALCOLM M'LEOD—*E. S. Gordon.*

MURDER—INSANITY—EVIDENCE—MEDICAL WITNESS—1. A pannel unanimously convicted of the murder of his wife,—his defence of insanity, at the time when the offence was committed, being held by the Court and Jury to have failed.

2. Question, Whether it is competent, in support of a plea of insanity, —(1.) to prove that a relation of the pannel was insane,—(2.) to ask a medical witness who had heard the evidence, what was the opinion which he had formed from thence as to the pannel's state of mind.

No. 12. Malcolm M'Leod.

MALCOLM M'LEOD was charged with Murder:

Murder.

IN SO FAR AS, on the 27th January 1838, within or near to the house situated at Clete, on the lands of Bayble or Byble, in the parish of Knock or Uie, or in the parish of Stornoway, in the island of Lewis, and shire of Ross, then occupied by him the said Malcolm M'Leod, he the said Malcolm M'Leod did wickedly and feloniously attack and assault the now deceased Henrietta M'Leod, his wife, and did seize her by the face, and did, with his hand, or in some other way to the prosecutor unknown, violently compress her mouth and nostrils, so as

to prevent her from breathing, and did throw her down upon the ground or floor, and did press forcibly with his knee upon her back, or some other part of her person, and did thereby break three or thereby of her ribs, and did continue to compress her mouth and nostrils in manner above libelled; by all which, or part thereof, or by some other means to the prosecutor unknown, the said Malcolm M'Leod did, then and there, put to death and murder the said Henrietta M'Leod.

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Murder.

The pannel pleaded not guilty.

EVIDENCE FOR THE PROSECUTION.

JOHN MACKENZIE, Esq. *Sheriff-Substitute of the Lewis district of Ross-shire, and* COLIN LEITCH, *Sheriff-Clerk-Depute*, proved the Declarations of the pannel, emitted, so far as they could judge, in his sound senses. The pannel expressed great contrition for his offence, and told every thing without any reservation.

The Declarations were then read.

The first was emitted at Stornoway on the 3d of February. The pannel stated that he was thirty-four years of age, and that he married the deceased Henrietta M'Leod, in the month of May or June 1829, by whom he had three children, boys. After their marriage they lived very happily together, but within the last three years they did not live so happily, which arose in consequence of a coolness on her part, from time to time, towards him—she not appearing to be so much attached to him as formerly—in which she was encouraged by some of her relations who lived near them. He stated further, that she had expressed to him that she wished him dead, and was indifferent though he should leave her altogether. On one occasion (which was their first quarrel) his wife was cutting potatoes in the house, while he was giving a lesson to some of his neighbour's children in Gaelic: she ordered him to go out and work at the labouring of the land, or she would stab him; upon which he went and called in two elders, to be evidence against his wife for threatening him. One night also, whilst he was in bed with his wife, he found her pressing him upon his breast with her elbow, by which he was awakened out of his sleep, in consequence of the pain, which he felt for some time afterwards. He told her she meant to take away his life, which she denied. She went to her father's house, taking with her the infant child, and did not return to her own house for four or five days, when she came back, accompanied by her sister, and the matter was made up. On the morning of the day libelled, Saturday the 27th January, they had some words, his wife upbraiding him for stopping at home, and not going out to his work. After this alterca-

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tion, which was about breakfast time, he went out with a creel, to bring home peats from a peat stack which was about a quarter of a mile from the house, and during that time, as well as upon other occasions, he was considering in his mind that she would surely kill him that night, and the thought of his wife taking away his life preyed on his mind. He brought home the peats, when they had some more words, and he went into the barn to thrash the corn for provender for the cattle: he returned, and his wife, being rather unwell, took some physic which had been given to her by a neighbour; he went and thrashed a little more in the barn, and again came back to the house. His wife was sitting on a bed which she occasionally lay upon near the fireside; she got up on her feet, and at this time his mind was *all through-other*, and he thought within himself, that if she were to live, he would have to die. He instantly seized her by the head with one hand, and clapped his other upon her mouth, when she fell down upon the ground upon her face; and he then applied both his hands upon her mouth and nose, to stop her breath. She struggled hard, and he then applied one of his knees to her side, or back, in order to prevent her struggling. He pushed and bruised with his knee upon her body, as much as he could, as he was determined to put an end to her existence. There came some blood from his wife's mouth and nose, before he took his hands off her face. He stated that he thought he was only about five or six minutes, in accomplishing the act of putting an end to his wife's existence. On finding life was extinct, he lifted her into the bed in which he and she usually lay, and laid her down upon her back therein, and washed her face, which was dirty from the dust of the floor, upon which she fell, when he had seized her, as before described. He washed her face from water that was in a metal pot, and took a towel or rubber to dry her face with. As he was just done, he heard his mother-in-law rapping at the door, upon which he put the pot and towel below the bed on which his wife's corpse lay, and went and opened the door. Previous to committing the act, he had secured the door, by putting up a spade or stick as a prop; his children were out at the time, but he did not put them out. It was about sunset when he committed the deed; and it was not just dark, but nearly so, when his mother-in-law came to the door.

In his second Declaration, emitted on the 7th of February, the pannel stated that he adhered to what he had previously said, except that he regretted having said so much against his wife for her treatment of him, because she has departed this life, and cannot now answer for herself. He stated further, that the deceased had a red worsted shawl upon her at the time he took away her life, which he tightened round her neck, the sooner to hasten her death. All that she was able to say, after he commenced taking away her life was,—"Let me alone." For sometime previous to his committing the act, he knew that she was with

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child to him; but at the moment he did the deed that circumstance did not occur to him. The declaration then described his escaping on the night he was apprehended, the 29th of January. He went to his aunt's house at Shadder, and learning that officers were in pursuit of him, he fled to the moor, and hid himself in a peat-stack. Next night he concealed himself in a barn; but here after considering within himself that he was disobedient to God and man, and that his mind was disturbed and his thoughts divided, and he did not know what to do, or where to go, he commenced prayer, when something struck him that it would be better for him to give himself up, whatever the consequences might be; and he then proceeded in the direction of Stornoway, with a view of coming to the Sheriff's house, and laying himself down at the door. While he was half-way between Barvas and Stornoway, he observed a man coming towards him, and being ashamed to meet the person, he sat down at the edge of the road in a gravel-pit, having put his cloak about his head, and placed his back towards the man. The man called out—"Who are you—are you asleep?" He answered that he came from Shadder; and after some further conversation, he asked the man if he was in search of him? He said he had the Sheriff's warrant for that purpose, and he (the pannel) went away with him to Stornoway, as he had intended, if he had not met with this individual.

CATHARINE M'DONALD, *wife of Malcolm M'Donald, fisherman, Clete.*—I knew the deceased Henrietta M'Leod, who lived next door to me. I saw her on the day of her death, some time after mid-day. She was complaining of being unwell; the pannel was in at the time. I remained rather less than an hour. After sunset, I saw Henrietta M'Leod, who was then dead. The mother of the deceased and her people were going into the house, and I went with them. The deceased was in a bed at the end of the house. The pannel said, as they were speaking about the death, that the loss was to him, not to them. On Monday night, the doctor and the procurator-fiscal arrived.

Cross-examined by GORDON, *for the pannel.*—On one occasion the deceased complained to me that the pannel behaved ill to her, and that she would suffer for it some day, as he was sometimes *through-other*. I observed nothing myself. The pannel was reckoned a religious man; he was once a schoolmaster. The deceased was of a mild temper.

ISABELLA M'AULAY or M'LEOD, *residing at Clete.*—I am the mother of the deceased. We lived very near each other. I last saw my daughter in life on a Saturday, about breakfast time. This was the same day she died. I went in the afternoon, and found the door fastened. I knocked at the door, but could not get entrance, and I went back, believing my daughter to be praying. I went again shortly after, and the door was still fastened. I knocked with some force, and then called out, after which the pannel came to the door. He did not say a

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Murder.

word until we came to the inner room, when he said, "Henrietta has nothing to say now—she cannot speak." I looked for my daughter, and saw her lying across the bed. I put my hand on her person, and ascertained she was dead. I then called out to the pannel, "Henrietta is dead." The brother and sister of the deceased then came to the house. The brother, Roderick M'Leod, said to the pannel, "As sure as Henrietta is dead you will die also." The pannel then came to me, and, patting me on the shoulder, said, "Don't you know that I was good to her?"

Cross-examined by GORDON *for the pannel.*—I never heard the pannel say he was jealous of his wife; neither did my daughter make any complaint of the kind. The pannel told me that my daughter was at one time going to stab him with a knife; but my daughter was of a mild disposition, and was very religious.

GORDON, for the pannel, proposed to ask the witness, whether she knew a son of the pannel's uncle who was insane at times.

Some discussion took place as to the competency of the question, in the course of which LORD COCKBURN observed, that it had been decided, in the House of Lords, that it was incompetent, in a civil cause, to lead evidence that the alleged insanity was hereditary.

Ultimately, the Advocate-Depute declined to press the objection, and the question was put; but no information was elicited, as the witness did not know the pannel's uncle or his family.

RODERICK M'LEOD, *tenant of Totteranach.*—I am the brother of the deceased. I heard the deceased complain that the pannel did not work for his family; he did not fish with his neighbours, though he was under an engagement to do so all the season. She said he had lost his character in consequence. I saw my sister on the bed dead; the pannel was standing by, and said it would be a great loss to him to want her. The body was warm about the breast at this time. The pannel said he did not observe any thing remarkable about his wife when she lay down. About an hour afterwards I saw some marks on the face of the deceased—some scratches about the mouth and cheek. There was some blood about the teeth. I have known the pannel for twelve years, (nine of which he has been married to his sister), and never considered him to be of unsound mind. He was unkind and uncharitable to his wife.

Cross-examined by GORDON *for the pannel.*—The pannel entertained

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towards his wife feelings of jealousy, which were unfounded. The deceased told me, that one day she was cutting potatoes at the end of the house, the pannel came up and said she must tell him to whom the knife belonged. She said, not to him; and she told him to keep off, lest the knife injured him. He let go his hold of her, and went for two elders. The elders came, and convinced him that his wife did not mean him any injury. The pannel made a curious piece of workmanship of wood, in the parish of Uig; it was like a cart-wheel, and was said to be intended for private prayer. This was all his wife said about it. He prayed inside the circle of the wheel; the sharp ends of the nails were up, as the deceased told me, and I myself saw afterwards the places where they had been. This was about five years ago. I heard that the pannel got up in church one Sunday, and spoke to the minister; the deceased said so; this happened six or seven years ago. The words he used were, "I am tired of you, you devil!" meaning the minister; or else, "I am tired of you, O devil, that is in me!" meaning himself. The deceased was very sorry for this, as it would injure her husband's character. The pannel told her that he was discovering the perpetual motion, and that if he had got the materials he would have made the discovery; he wanted loadstone. The pannel also said he was engaged in some plan for propelling vessels without wind or tide.

By SHAW STEWART.—This plan was tried on a small boat last winter, the pannel having made machinery for it. He wrote a great deal about the perpetual motion. As a religious man, the pannel thought himself better than other people. He left the church, and some people called on him privately to receive instruction from him.

By the COURT.—The pannel had three children living; he worked for them industriously, at the fishing and harvest work. He conducted himself, generally, more judiciously than other people. I never heard of his being insane.

GEORE STEWART, *tenant in Big Park.*—I am second cousin of the deceased. On the night when the deceased was lying dead on the bed, the pannel was wringing his hands, and said he was an object that night. Some people asked him, how she got to the bed; he answered that she got to the bed herself. There were some scratches on her face, and something like blood on her teeth. I have known the pannel for four or five years. I never thought him wrong in his mind, except one day. That was about four years ago, on a Sabbath in the harvest time, when I saw him going to the river with a bed-cover about him. He spread the cover on the water twice, and then wrapt it about his person. I did not speak to him. He and I have frequently lived together. We fished together for twenty days last year, and he conducted himself like the rest of the crew.

CHRISTIAN MURRAY, *one of the pannel's neighbours*,—went to his house on the day of his wife's death, and saw nothing remarkable about him. For the five years during which she had known him, she always

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believed him to be of sound mind; and he was treated as such by all his neighbours.

DONALD MACRAES, *tenant in Big Park*, gave a similar account of the pannel during nine years that he had known him.

RODERICK ADAM, *mason, in Stornoway*.—I acted as assistant to the constable in the apprehension of the pannel. There is no jail in Stornoway, and I assisted to keep him in a house. He spoke about the crime, and confessed that it was himself did it. He said he took his wife by the mouth and nose with his hand, that she fell forward towards the fire, and he gave her two or three *chaps* with his knee on the back. He said she did not live above four or five minutes, that he next got some water to wash away the ashes and blood off her face, that he might conceal it. He said she did not get time to speak—five minutes was the longest time the whole took. He made no remark as to the cause of his murdering his wife. I was from twelve to sixteen days with him, and thought there was nothing incorrect about his mind. He spoke about the death of his wife as sensibly as on other subjects.

Cross-examined by GORDON *for the pannel*.—The pannel expressed much regret for his conduct: he said, if he had a thousand worlds, he would give them all, that she were alive again.

DONALD M'LEOD, *Sheriff-officer*, and DONALD M'KENZIE, *gamekeeper*, corroborated the preceding witness as to the pannel's confession, and also proved his escape and subsequent apprehension.

The following letter, written by the pannel to his brother, after his apprehension, was then proved, and read to the Jury.

"February 5, 1838.

"My Dear Brother,—I must leave you under the law of the kingdom for my great sins against heaven and earth, which cannot be suffered without punishment, whatever the Lord in mercy do to my sinful soul through eternity. My great black and scarlet sin is before him. What can I say to you, but I have a low eye and trembling heart, and a low hope that the Lord have mercy on me a cursed poor man.

"Because that every man may ask his own possession, I must tell you, so far as I can, few things was between me and merchants in Stornoway. I hope that you will do a duty, and pay them with the things which I left. You will be so good as speak to Mr. John Mackenzie, the merchant, Stornoway; for he have some money against me since two years. You will sell the things at home and pay him, whatever the Lord do to my poor children on his own care more. And few things I find from Mr. Colin Morrison the merchant, for the fishing use; I think that not lings and cods; pay that to him. I to tell you so much of the fishing—we catch 50 lings and 20 cods: but if you sell or make use of the new talin of the herring net that will pay the whole

to him; and Mr. John M'Rae, turner, Burghead, one bottle of oil 6d. against me for a while; and Mr. John Urquhart the wright ask pint of oil for little things he do to me. Peter M'Farlane have a little against me, and Mr. James Mackenzie merchant have some too; and I have 3s. against Mr. William Fairbairn Stornoway to find from him. So far as I know very little against me in the country of debt, but great kindness of many.

"I heard that they think to burn my house, and any that do so he will come to me for my sin and not the house. I trust that you will speak to Mr. Kenneth C. Shadder for about 30s. he had against me for the cow, and if he will take the [word destroyed by the wafer]. Rory Macleod, Babyle, he know more punctually the things which I left. John Macaulay, Shadder, have 5d. against me, and I have a shilling against Norman Macdonald, Bayble; 2s. or worth, against Neil Macrae; 4s. against Ronald Mackenzie—that will be given to Rory. I left the other things to yourselves spared this day.

"Poor, poor, poor

"MALCOLM MACLEOD."

Addressed—

"Mr. Angus Macleod, Port Vallon, parish of
Uige or Knock, Stornoway."

The following translation of a letter written by the pannel in Gaelic to his brother-in-law, was also proved and read:—

"February 6th, 1838.

"Dear Friend,—I am now bound with the good laws of the kingdom, for my heinous sins, in the presence of God and of men. I now confess with sorrow and shame the thing for which I am deserving of being in chains of darkness till the great day of judgment. Death and eternity are now before me; my burden is too heavy, my hands are red and corrupted with blood, and my fingers with iniquity. I am now under the curse; my sins were great before, but now much greater. Little is my confession worth, unless Jesus Christ will have great mercy on me in these short minutes. My eye is towards God through Christ, this day, that he may have mercy on me a lost sinner, even the chief of the blackest of sinners. Oh, it would be honourable to me this day, that she had been living, and I dead; not that I should live these few short days under great disgrace. My eye is towards the Lord this day. I pray thee, from the brink of Jordan, that you nor any other will not impute my sins to my poor children; but that you will shew them mercy for the sake of the Lord, and that you will set a godly example before them in the days of their youth. Sorrowful I am; but although you should not remember me to them, remember the Redeemer to them; wheresoever they go, they are under his care.

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Murder.

"It is incumbent upon me to tell you to take charge of the house and furniture which are left; but I am forgetting them all because of what is before me. Let yourself, my brother, look after these things, and sell them according to their value, in order that the debts may be paid. I have written about the whole yesterday to my brother, but as to what is between you and I, regarding the barley we bought at Aignish, you have the most part of it for the meal you sold; and the balance of the rent, when you sell the house, should be paid; what I paid was one pound last year to Mr. Knox, and a 20s. note to the ground officer, Mr. Macpherson, this year, as you know. You may sell the crop and the potatoes, and pay the debts in a short time, before I finally leave you.

"You will understand that care should be taken of the children, whatever place they be in; send one of the blankets to each of them, and make use of the other few clothes for them according as they will suit. I hope that you will see the whole turned to a good account. I trust you will come to see me, although I am unworthy of it.

"Great, great, great, is the mercy that I have an offer of Christ, the Saviour, this day, that I may receive him.

"The poor wretch,

"MALCOLM MACLEOD."

Addressed—
"Mr. Roderick Macleod,
Tenant at Bayble."

RODERICK MILLER and ALXANDER M'IVER, *both surgeons in Stornoway*, proved the *post mortem* examination of the body of Henrietta M'Leod. It appeared to them that death was caused by suffocation and violence. The deceased was in the sixth month of her pregnancy.

EXCULPATORY EVIDENCE.

CATHERINE M'LEOD, *residing at Clete*.—I am the pannel's sister. He sometimes spoke of his wife in a violent manner, but I never heard him say he was jealous of her. The deceased, however, said that her husband was jealous of her, and told me a story of her husband having sworn her on the Bible. She said he had made her go down on her knees, and swear on a Bible that she never had connection with any other man. The deceased was much grieved at this conduct; she was a circumspect and virtuous wife. I never saw the wheel which the pannel had made, but I saw something of the pulpit he had. The deceased used often to speak of the pulpit, and said it was a very curious idea. The deceased also spoke to me, about the pannel saying that she (his wife) attempted to stab him, and of his going to the elders about it. I was in the house when the elders came, and the pannel persisted before them in stating that his wife wanted to stab him. The wife denied it. The pannel said his wife had put her elbow on his breast one

night in bed to kill him, upon which he got up, and put her out of the house. The deceased said she did nothing of the kind, and that his conduct was most extraordinary; she could not account for it. I recollect the deceased telling me of the pannel speaking in church, and of the words he spoke—"I am tired under you, you devil." His general conduct was sober, quiet, and inoffensive; he was looked upon as religious, but he did not frequent the church for some time before the period of the death, in consequence of having objections to the clergyman's doctrine.

Cross-examined by SHAW STEWART.—The deceased was a communicant, but the pannel was not, after he ceased to frequent church. It is about six years since he spoke in church, and about three years since the story about the elbow.

REV. MR. M'KENZIE, *Knockbain*.—I had a school in Stornoway some years since. The pannel attended the school for about half a year in 1824 or 1825. He was learning a little English, to qualify himself for being a Gaelic teacher. He was of a mild and gentle disposition; he did not manifest any particular quickness or slowness at school. When he left the school, the pannel wrote a letter to me, which appeared to have been written in blood. He called on me in the spring of 1833 or 1834, and intimated that he had discovered the perpetual motion. I was a little astonished, but I knew that the pannel had fanciful and peculiar ideas on religious subjects. In the same year he wished me to apply to the member for the county, to procure for him fourteen or twenty-eight pounds weight of loadstone, which was to be the moving power in the machine for the perpetual motion. The member for the county was the pannel's landlord.

DR. CHISHOLM, *Inverness*.—I am aware that insanity is generally divided into four sections—moral insanity, mania, monomania, and dementia. A person may have a delusion on one subject, and be perfectly sane on all others. The intellect may be so constituted, that a man may be impelled, by partial derangement, to do an act of violence, or commit a crime, though conscious at the time that he is doing wrong. There may be moral insanity, and yet no particular delusion.

GORDON, for the pannel, proposed to ask the witness, who had been present during the trial, what was his opinion, from the evidence which he had heard, as to the state of the pannel's mind, and specially with reference to the act for which he was tried. After some discussion, as to the competency of examining a witness on a question which it was properly the province of the Jury to answer, the point was not pressed.

SHAW STEWART, for the prosecution, argued, that the

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pannel's guilt was clearly established, and the defence, that from insanity he was not responsible for his actions, had wholly failed.

E. S. GORDON, for the pannel, answered,—The pannel was evidently deranged at the time when he committed the crime. The various kinds of insanity have been divided into,—1. Idiocy, where the mental faculties have been wanting from birth; 2. Dementia, where the faculty of judgment is entirely lost; 3. Mania, where the understanding is generally deranged; 4. Monomania, where the understanding is *partially* diseased, under the influence of some particular illusion, referring to one subject, while the intellectual powers are, on other subjects, in a great measure unimpaired; 5. Moral Insanity, where there is no insane illusion or defect of the intellect, but a morbid perversion of the feelings, temper, and natural impulses. (Pritchard's Treatise on Insanity; Watson's Medical Jurisprudence, p. 322.) The present case partakes of the character of the two last. (See case of Doux. Beck's Medical Jurisprudence, 5th Edition, p. 410.) In cases of *monomania*, if the crime can be traced as directly flowing from the prevailing delusion in the mind of the criminal, he is not responsible. (Speech of Lord Erskine in the case of Hadfield, State Trials, vol. xxvii. p. 1307; Alison, vol. i. p. 645.) That the pannel was not of sound mind generally, is proved by a variety of circumstances, such as his writing the letter to Mr. M'Kenzie in blood, —his strange religious notions,—the inexplicable story with regard to the wheel, studded with nails, upon which he prayed,—the pulpit,—the story of the blanket, which he put into the river, and then threw around his shoulders, which made the witness who saw it *think him mad*, —his fancy that he had discovered perpetual motion; and, above all, his wild and extraordinary exclamation in church, which, of itself, was sufficient to point out a diseased mind, and proved that he was a person who acted upon incontrollable impulses. But the prevailing illusion of his intellect, which seems to have influenced his

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whole conduct, and constituted the peculiar monomania of his mind, was jealousy of his wife, and a belief that his life was threatened by her. (See the case of Clark *v.* Clark, 1825; Pritchard, p. 376.)

LORD COCKBURN, charged the Jury, directing their attention to the legal authorities on the subject, (Hume, vol. i. pp. 37, 38. Alison, vol. i. pp. 644, 645,) and expressing a decided opinion that the general result of the evidence was, not merely that the defence of insanity was not made out, but that it was disproved.

The Jury unanimously found the pannel guilty.

In respect of which verdict of Assize, he was sentenced to be executed at Inverness on the 11th of May.[1]

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[1] In consequence of an application to the Secretary of State, two successive respites were obtained, for the purpose of staying the execution of M'Leod, until additional evidence could be obtained regarding his alleged insanity. A proof was accordingly taken at Stornoway. Several of M'Leod's neighbours deponed, that for the last three years, they had considered him subject to temporary fits of insanity; but the general character which he received was that of a remarkably sober and religious man, of a very mild and easy disposition, but of a visionary and abstracted turn of mind. He had been remarkable since his school-boy days for his patient endurance of injuries, and a temper quite the reverse of irritable. Various instances of his eccentric conduct were detailed; such as his, on one occasion, working in the open air in a state of almost entire nudity,—his rolling himself up in a blanket which he had previously steeped in a river, and which he wore by way of doing penance for the sins of his neighbours,—and his constructing a large wheel, studded with ten long iron spikes, within which he was in the habit of praying, and the object of which he explained to be, that each spike represented one of the ten commandments, and if he fell asleep while engaged in prayer, he would be pierced by those spikes which represented the particular commandments which he was most deficient in observing. His deceased wife had once informed a neighbour, that he did not at times know what he said or did; and on the occasion of his calling out in church, as described in the evidence on the trial, he stated himself, that he did not believe he was in his sound mind. The circumstance of his supposing, that if he had proper materials, he could discover the perpetual motion, was fully established, and a letter produced, in which he stated in regard to it, "Now, as it is a machine of

ABERDEEN.

April 19
1838.

Judges.—LORDS MONCREIFF AND COCKBURN.

HER MAJESTY'S ADVOCATE.—*Shaw Stewart*

AGAINST

MARY LORIMER—*Shand.*

INDICTMENT.—A statement, subjoined to a charge of theft, that the pannel was only prevented from committing farther depredations by being detected in the act of stealing, struck out of the Indictment.

No. 13.
Mary
Lorimer.
———
Theft, &c.

Mary Lorimer was charged with Theft, aggravated by her being habite and repute a thief, and having been previously convicted of Theft,

IN SO FAR AS, on the 17th of March 1838, within the house situated at Bridge of Dee toll-bar, in the parish of Nigg, and shire of Kincardine, occupied by James Reith, &c. the said Mary Lorimer did, wicked-

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" such utility, I think it the greatest loss that it should remain concealed, " since it is so plainly discovered to me, and that as from the Lord." Two of the witnesses spoke of a report which they had heard, that M'Leod had said that he could not discover the perpetual motion till he committed a murder. And the way in which he applied to Mr. Stewart Mackenzie, then Member of Parliament for the county, and his landlord, for twelve pounds of loadstone to assist him in his discovery, had, in the year 1836, impressed that gentleman and his factor, Mr. Knox, with the opinion that he was of unsound mind. The evidence given on his trial, as to his apprehension of violence from his wife, and his supposing, on one occasion, that she had attempted to stab him, was corroborated. And it was farther proved that his uncle's son was subject to fits of temporary insanity, many symptoms of which were very similar to the circumstances referred to in M'Leod's conduct. This evidence had the effect of convincing several respectable gentlemen, including Dr. M'Iver, who was examined on the trial, and two other medical men of considerable experience, that M'Leod was insane at the time when he committed the offence. And their representations, together with the whole proof taken in the case, having been forwarded to the Secretary of State, raised considerable doubt as to the prisoner's state of mind upon the point of sanity, and accordingly led to his life being spared.

ly and feloniously steal, and theftuously away take, two or thereby muslin caps, and a child's cap, the property, or in the lawful possession of Isabel Cairnie or Reith, wife of the said James Reith, or of the said James Reith, *and was only prevented from committing farther depredations by being then and there detected in the act of stealing.*

No. 13. Mary Lorimer, Aberdeen, April 19 1838.

Theft, &c.

SHAND, for the pannel, objected to the last words of this charge remaining in the Indictment, as the law could not anticipate the pannel's intentions.

SHAW STEWART, for the prosecution, answered, that there were innumerable precedents for a narrative of this kind being inserted in Indictments, but as the Court appeared to have doubts on the subject, he had no objection to the words being struck out.

This was accordingly done, and the pannel pleaded guilty to the charge contained in the Indictment as amended.

In respect of which judicial confession, she was sentenced to be transported beyond seas, for the period of seven years.[1]

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[1] A point somewhat analogous to that noticed in the text occurred in the High Court, in the case of Allan Lawrie, tried on the 14th of July 1837, before Lords Meadowbank, Medwyn, and Cockburn, accidentally omitted in the first volume of these Reports. The pannel in that case was charged with theft by opening lockfast places, "AS ALSO, the "wickedly and feloniously opening lockfast places with intent to steal." The minor proposition applicable to the latter charge bore, that the pannel and another person, against whom the diet was not called, did, "both and each, or one or other of them, wickedly and feloniously "open, by means of a false key, or in some other way to the prosecutor "unknown, a lockfast drawer, and this they did with intent to steal, "and they were only prevented from stealing from said drawer, by "being then and there detected and apprehended." J. T. GORDON, for the pannel, objected, that there was no precedent or authority making opening lockfast places with intent to steal an article of dittay. SHAW STEWART, for the prosecution, answered, that attempts to steal were frequently punished in the inferior courts. LORD MEADOWBANK thought, that precedents for such a charge might be found even in the Court of Justiciary. LORD MEDWYN, having been taught, contrary to his own opinion, that attempt to commit prison-breaking was an indictable offence, could not hold the charge in question irrelevant.

April 24
1838.

PERTH.

Judges.—LORDS MONCREIFF AND COCKBURN.

HER MAJESTY'S ADVOCATE—*Shaw Stewart*

AGAINST

JOHN DAVIDSON—*E. S. Gordon.*

AGGRAVATION—EVIDENCE.—A substantive aggravation, such as opening lockfast places, is not sufficiently proved by the unsupported evidence of one witness.

No. 14. John Davidson. Theft, &c.

JOHN DAVIDSON was charged with Theft, "more especially when committed by means of opening lockfast places." He pleaded not guilty.

The crime was charged as having been committed by the pannel stealing L.22 from a lockfast chest. In his declaration he admitted the theft, but denied that the chest was locked. The owner of the chest swore positively that he had locked it; but his evidence was wholly uncorroborated on this point. The proof having been concluded,

E. S. GORDON, for the pannel, argued, that a substantive aggravation, such as opening lockfast places, could not be proved by the unsupported evidence of one witness.

LORD MONCREIFF charged the Jury.—The fact of the chest having been locked, and the pannel having opened it, is stated as a separate aggravation of the charge; and as such, it must be proved by the evidence of two witnesses, or by that of one witness and corroborating circumstances. The evidence of the owner of the chest is very distinct as to its being locked, but that evidence is

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LORD COCKBURN was of opinion, that opening lockfast places with intent to steal was a crime, but kept his mind open, as he was told there was no precedent on the subject. The pannel having pleaded guilty of theft, as libelled, the second charge was departed from.

wholly unsupported. In one sense, indeed, the fact of the theft itself may be regarded as a corroborating circumstance. Still, as there is no direct corroboration of the evidence of the principal witness, the pannel ought not to be found guilty of the aggravation charged.

No. 14. John Davidson, Perth, April 24 1838. Theft, &c.

The Jury unanimously found the pannel guilty of the theft libelled, but the aggravation of its being from a lockfast place not proven.

In respect of which verdict of Assize, he was sentenced to be imprisoned in the jail of Perth, for the period of nine calendar months.

HER MAJESTY'S ADVOCATE—*Shaw Stewart*

April 26 1838.

AGAINST

MURDOCH M'KENZIE M'INTOSH—*Ross.*

EVIDENCE.—The declaration of a party since deceased, taken by way of precognition, by a person not a magistrate, without witnesses, and when the party was not in apprehension of death, found not to be an admissible article of evidence, although it had been subsequently read over to the declarant, and attested by her in presence of a magistrate.

MURDOCH M'KENZIE M'INTOSH was charged with Theft, by opening lockfast places. He pleaded not guilty.

No. 15. Murdoch M'Kenzie M'Intosh, Perth. Theft, &c.

Among the productions libelled on, was "a declaration, "bearing to be dated at Forfar, the 13th day of June "1836, and signed Elizabeth Mill." It was proved that Mill was since dead, and that the declaration in question had been taken from her, in the way of precognition, by the Procurator-fiscal's clerk, without witnesses, when she was in no apprehension of death, but in perfect health, and had afterwards been read over and attested by her in presence of the Sheriff.

No. 15. Murdoch M'Kenzie M'Intosh, Perth, April 26 1838.

Theft, &c.

ROSS, for the pannel, objected to the admissibility of the declaration as an article of evidence.

SHAW STEWART, for the prosecution, referred to the authority of Alison, Vol. ii. pp. 606, 608.

LORD COCKBURN.—Even if this declaration had been taken before a magistrate, when the declarant was under no apprehension of death, I should have wished to have the point fully argued, before I could have admitted it. In civil cases, although we allow casual and unpremeditated expressions by parties since deceased to be proved in evidence, we never, in such circumstances, admit a long detailed statement of the matter under inquiry. But the ground upon which I hold the declaration in this case quite inadmissible is, that there was no examination before a magistrate at all.

LORD MONCREIFF.—The declarant's illness was not such as to create apprehension of death, and therefore the declaration was not emitted by her under such impressions, as might induce us to dispense with the ordinary solemnities of an instrument of this kind. The point is quite different from a proof of expressions used by a party since dead.

The proof having been concluded, the Jury found the pannel guilty as libelled.

In respect of which verdict of Assize, he was sentenced to be transported beyond seas, for the period of seven years.

April 27 1838.

HER MAJESTY'S ADVOCATE—*Shaw Stewart*

AGAINST

ROBERT HERON—*E. S. Gordon.*

AGGRAVATION OF HABITE AND REPUTE.—A pannel having been fugitated in April 1832, on a charge of Theft committed in December

1831, and proved to have been habite and repute a thief for two years previous to the latter date, but no evidence being led as to his character from that time till April 1837, when he was again apprehended,—held that the aggravation could not be found proven, on the ground that the statement of it applied to the date of trial, not to the time when the offence was committed.

No. 16. Robert Heron, Perth, April 27 1838.

Theft, &c.

ROBERT HERON was charged with Theft, "more especially when committed by opening lockfast places, and "by a person who is habite and repute a thief, and has "been previously convicted of Theft." He pleaded not guilty, and a proof was led, which was quite conclusive as to the principal charge, and the aggravation of previous conviction.

In support of the other aggravation charged, it was proved by the evidence of police officers, that the pannel had been habite and repute a common thief for two years previous to December 1831, when the crime was committed. A sentence of fugitation pronounced against him by the Circuit Court of Justiciary at Perth on the 20th of April 1832, and the relative Indictment were then produced. But no evidence was led as to his character from that period till April 1837, when he was apprehended, and had been in jail ever since.

SHAW STEWART, for the prosecution, argued,—The pannel must be found guilty as libelled. It is true that the Indictment charges the theft to have been committed "by a person who *is* habite and repute a thief," but this relates to the date of the commission of the crime. (Alison, vol. i. pp. 297. 300). Under a charge that the pannel "*has* been previously convicted of theft,"—a conviction subsequent to the crime charged cannot be adduced. In the present case, the sentence of fugitation in 1832, which implies the pannel's guilt of being habite and repute a thief at that time, cannot have the effect of wiping out the character which he then bore. He has been proved to have been habite and repute a thief up to the date of the fugitation; and the fact that ever since that date he has been eluding the officers of justice, who have been in search of him as a

No. 16. Robert Heron, Perth, April 27 1838.

Theft, &c.

thief, must at least throw upon him the *onus* of proving that he has recovered his character for honesty.

E. S. GORDON, for the pannel, answered,—The words of the Indictment refer to the present time, not to the time when the crime was committed. The minor proposition charges, "And you the said Robert Heron *are* habite and "repute a thief," which explains the charge in the major. Guilt of being habite and repute a thief from 1832 to the present time is not to be presumed. The *onus* of proving it lies with the prosecutor, and the fact that no person can say that the pannel has borne that character for the last six years, is sufficient to acquit him. His having undergone a sentence of fugitation is no evidence that he continued the habits of a thief.

LORD MONCREIFF.—I cannot reconcile with my notions of the charge of habite and repute, that the evidence submitted by the prosecutor is sufficient to fix that character on the pannel. But at all events, the form of the Indictment precludes the consideration of that evidence. The question sent to the Jury is not whether the pannel, at the time when he committed the theft charged, was habite and repute a thief, but whether that character attaches to him *now*. It is said, "You, the said Robert "Heron, *are* habite and repute a thief." If it was wished to raise the question, whether it is sufficient to prove the pannel's character at the time when he committed the theft, the Indictment ought to have set forth, "You *were* "habite and repute a thief." I think that would not be a relevant charge; and the effect of admitting it would be, that a man could not regain a character for honesty, however correct his conduct might be in the interval, until he was tried for an offence committed years before, when his character was bad. The fugitation can have no effect in supplying the defect of evidence, since the pannel's non-appearance might have proceeded from many causes, and is no proof of his guilt of the charge on which he was cited. The aggravation of habite and repute, as recog-

nized in our law, is sufficiently hard on an accused party, and I do not think that it ought to be strained.

No. 16. Robert Heron, Perth, April 27 1838. Theft, &c.

The Jury found the pannel guilty as libelled, with the exception of the aggravation of habite and repute, which they found not proven.

In respect of which verdict of Assize, he was sentenced to be imprisoned in the Bridewell of Dundee, and kept to hard labour, for the period of fifteen calendar months.

SOUTH CIRCUIT.

Spring 1838.

DUMFRIES.

Judge—THE LORD JUSTICE-CLERK.

April 23 1838.

HER MAJESTY'S ADVOCATE—*Innes*

AGAINST

JAMES WILSON and JOHN MADDAN—*Irving*.

AGGRAVATION OF HABITE AND REPUTE.—The aggravation of being habite and repute a thief found proven against a pannel tried in April for a theft committed in October preceding, on the evidence of police officers that he had borne that character for 18 months or two years, although he had been in jail ever since the commission of the crime, and it was proved in exculpation, that within nine months before he committed it, he had worked regularly at his trade.

No. 17. James Wilson and John Maddan. Theft, &c.

JAMES WILSON and JOHN MADDAN were charged with Theft, aggravated by their being habite and repute thieves, and having been previously convicted of Theft. They pleaded not guilty, and a proof was led.

The evidence was quite conclusive as to the principal charge and the previous convictions. The pannel, Wilson, was also proved to have been habite and repute a thief.

No. 17. James Wilson and John Maddan, Dumfries, April 23 1838.

Theft, &c.

Two police officers were examined in regard to the pannel Maddan's guilt of this aggravation. One of them swore that he had been habite and repute a thief for two years, the other that he had borne that character for eighteen months. Both deponed, that during the period to which their evidence referred, he had apparently no other means of livelihood than thieving. It was proved for the pannel, in exculpation, that he had been apprentice to a joiner some years ago, and that he had worked regularly in that employment for three months previous to the beginning of April 1837. The theft with which he was charged was committed on the 14th of October.

INNES, for the prosecution, argued,—The pannel is proved to have been habite and repute a thief for nearly thirteen months.

IRVING, for the pannel, answered—The period during which that character has attached to him, must be counted from the time when the offence was committed, and not from the date of the trial. From the beginning of April, when he left his work, to the 14th of October, when the theft was committed, is only six months and a half. (Jean Dickson or Benton, High Court, July 11 1836. Swinton, Vol. I. p. 245.)

The LORD JUSTICE-CLERK expressed an opinion that the aggravation of habite and repute had been sufficiently proved, and the Jury, under his Lordship's direction, found the pannels guilty as libelled.

In respect of which verdict of Assize, they were sentenced to be transported beyond seas, for the period of seven years.

HER MAJESTY'S ADVOCATE—*Innes*

AGAINST

JAMES IRVING—*Logan.*

ASSAULT.—EXCULPATORY EVIDENCE.—It is competent for the pannel to lead evidence of the passionate disposition of the party assaulted, having given notice in his defences of his intention to do so; but he cannot prove specific acts of violence committed by him.

No. 18. James Irving, Dumfries, April 23 1838.

Cutting and Stabbing.

JAMES IRVING was charged with Cutting and Stabbing, laid alternatively under the statute 10 Geo. IV. c. 38, § 2, and at common law. The party on whom the assault was charged to have been committed was Theodore Blaikie, a blind fidler.

The pannel pleaded not guilty, and the following Defences were lodged for him:—

"The pannel admits having inflicted a cut with a knife on Theodore "Blaikie, as set forth in the Indictment, but avers that he did so in "order that he might liberate himself from the grasp of the said Theo- "dore Blaikie, by which he was in danger of being strangled. The "pannel farther avers that the said Theodore Blaikie is of a fierce and "violent disposition, or at least that he is subject to strong gusts of "passion; and the pannel offers to prove, by competent evidence, that "on various occasions, and while under their influence, he endeavoured "to strangle various persons, and was prevented from doing so only "by the forcible interference of third parties."

On these Defences being read,

The LORD JUSTICE-CLERK observed, that proof of individual acts of violence by Blaikie was clearly incompetent; but he would certainly allow it to be proved that he was a passionate man.[1]

Blaikie's sister, who was the first witness for the prosecution, was accordingly interrogated on this point, and

[1] See Alison, Vol. II. p. 533, where the competency of such an investigation as was here allowed, is stated as a point not at that time fully established.

No. 18. James Irving, Dumfries, April 23 1838.

Cutting and Stabbing.

stated, that her brother was very passionate when tipsy, but that, on the occasion referred to, he was perfectly sober.

After her examination, and that of Blaikie himself, the pannel, by the advice of his counsel, pleaded guilty to the common law charge.

He was accordingly sentenced to be imprisoned in the Jail of Dumfries, and kept to hard labour, for the period of fifteen calendar months, and farther ordained to find caution to keep the peace for five years, under a penalty of 300 merks, failing which, to be imprisoned for an additional period of three months.

AYR.

April 27 1838.

Judge.—LORD MEADOWBANK.

HER MAJESTY'S ADVOCATE—*Innes*

AGAINST

DAVID ALEXANDER—*Craufurd.*

EVIDENCE.—WITNESS.—A party on whom an Assault was charged to have been committed, having denied on his examination, that he received any injury from the pannel,—held competent to examine a subsequent witness, in regard to a charge made by that party against him *de recenti*, not with a view of contradicting the evidence of the first witness, but as relative to a direct accusation of guilt, made in the pannel's presence, and to himself.

No. 19. David Alexander.

Cutting and Stabbing.

DAVID ALEXANDER was charged with Cutting and Stabbing, laid alternatively under the Statute 10th Geo. IV. c. 38, § 2, and at common law. He pleaded not guilty, and a proof was led.

No. 19. David Alexander, Ayr, April 27 1838.

Cutting and Stabbing.

John Howie, the pannel's uncle, on whom the assault was charged to have been committed, was the first witness examined. He admitted having had a scratch on his throat, but said he did not know how he got it, and denied positively that it was inflicted by the pannel.

INNES, for the prosecution, proposed to ask a subsequent witness, whether Howie had, in his presence, very shortly after the affair took place, accused the pannel of having cut his (Howie's) throat with a razor.

CRAUFURD, for the pannel, objected to the question, on the ground that it is incompetent to contradict what a witness has sworn in Court, by proof of his having made a different statement when not on oath.

LORD MEADOWBANK held that the question was competent, not with a view of contradicting the evidence of Howie, but as relating to a direct accusation of guilt made against the pannel personally. By allowing that accusation to pass unchallenged, he, in effect, adopted the words as his own. The whole particulars of the conversation, therefore, stand in some degree in the same situation as a confession by the pannel, and are, undoubtedly, a part of the *res gesta*.

The proof having been concluded, the Jury, by a majority, found the pannel guilty.

In respect of which verdict of Assize, he was sentenced to be imprisoned in the Jail of Ayr, and kept to hard labour, for the period of twelve calender months.

WEST CIRCUIT.

Spring 1838.

April 23
1838.

INVERARY.

Judge.—LORD MEDWYN.

HER MAJESTY'S ADVOCATE—*Handyside*

AGAINST

HUGH LEITCH—*Fletcher.*

RAPE.—EXCULPATORY EVIDENCE.—A pannel charged with rape, or assault with intent to ravish, having averred, that the woman on whose person the offence was said to have been committed, had *de recenti* afterwards been found in bed with another man,—proof of this averment allowed, as bearing on the quality of the assault, and the extent of the injury said to have been inflicted, but evidence of her alleged immoral character, subsequent to that time, found incompetent.

No. 20. Hugh Leitch.

Rape.

HUGH LEITCH was charged alternatively with Rape, or Assault with intent to Ravish. He pleaded not guilty, and special Defences were lodged, offering to prove that Elizabeth M'Lachlan, on whose person the offence was said to have been committed, was at that time, and still continued to be, a person of loose and immoral character, and that *de recenti* after the alleged injury, and on the same evening, she had been found in bed with another man.

HANDYSIDE, for the prosecution, objected to any evidence being led regarding the character or conduct of the woman subsequent to the offence charged.

FLETCHER, for the pannel, argued,—that proof of the averments contained in the Defences ought to be allowed, as showing—not only the loose and immoral character of the woman, both before the alleged offence, and down to

the present time,—but also the extent of the injury said to have been inflicted on her person.

No. 20. Hugh Leitch, Inverary, April 23 1838.

Rape.

LORD MEDWYN allowed the proof only in respect of its bearing upon the quality of the assault, and the extent of the injury said to have been inflicted upon the woman, but refused to allow evidence of her alleged immoral character subsequent to that time.

The proof having been concluded, and the averment in regard to the circumstances in which M'Lachlan was found on the evening of the day libelled clearly established,—

HANDYSIDE, for the prosecution, departed from the charge of Rape.

The Jury found the charge of Assault with intent to Ravish proven, and the charge of Rape not proven; and in all the circumstances of the case, recommended the pannel to the leniency of the Court.

In respect of which verdict of Assize, he was sentenced to be imprisoned in the jail of Inverary, for the period of twelve calendar months.

GLASGOW.

Judges—LORDS MACKENZIE AND MEDWYN.

April 30 1838.

HER MAJESTY'S ADVOCATE—*Handyside*

AGAINST

ELIZABETH JEFFRAY.—*Craufurd.*

MURDER.—WITNESS.—1. A pannel convicted, on circumstantial evidence, of a double murder.

2. It is incompetent to examine a medical witness who has been in Court during the previous part of the trial, in regard to facts connected with the case, wholly apart from his medical opinion.

No. 21. Elizabeth Jeffray, Glasgow, April 30 1838.

Murder.

ELIZABETH NICKLSON or SHAFTO, or JEFFRAY, was charged with Murder,

IN SO FAR AS, (1,) on the 4th of October 1837, within the house or room situated in the village of Carluke, and shire of Lanark, then occupied or possessed by Ann Newal or Carl, residing there, widow of the late Peter Carl, weaver in Carluke, the said Elizabeth Nicklson or Shafto or Jeffray, did wickedly and feloniously administer to the said Ann Newal or Carl a quantity of arsenic, which she had mixed up with meal and water, and whisky, or some other similar ingredients to the Prosecutor unknown, and by falsely representing to the said Ann Newal or Carl, and to Walter Cullens, then residing with her, or to one or other of them, that the mixture was innocent, or that it was a medicine intended for her benefit, or by some other false representation to the Prosecutor unknown, did induce the said Ann Newal or Carl to swallow the said mixture, or part thereof, which she the said Elizabeth Nicklson or Shafto or Jeffray, handed to her herself, or gave to the said Walter Cullens to be handed by him to her, and the said Ann Newall or Carl having drunk thereof, thereafter became violently ill, and died next day, in consequence of having swallowed the said mixture, or part thereof, and was thus wilfully poisoned and murdered by the said Elizabeth Nicklson or Shafto or Jeffray: AS ALSO, (2), upon the 28th of October 1837, and within the house in Carluke aforesaid, then occupied by her the said Elizabeth Nicklson or Shafto or Jeffray, she the said Elizabeth Nicklson or Shafto or Jeffray, did, wickedly and feloniously, administer to Hugh Munro, then labourer or miner at Carluke aforesaid, and then lodging with her, a quantity of arsenic, which she had mixed up with porridge, prepared by her for his eating, and the said Hugh Munro having partaken of the said porridge, thereafter became violently ill, and continued so during the whole of the two following days: And the said Elizabeth Nicklson or Shafto or Jeffray did again, on the 30th of October 1837, &c. and place last libelled, wickedly and feloniously administer to the said Hugh Munro a quantity of arsenic, which she had mixed up with rhubarb, or some other ingredients to the Prosecutor unknown, and by falsely representing to the said Hugh Munro that the mixture was innocent, or that it was a medicine intended for his benefit, or by some other false representation to the Prosecutor unknown, did induce the said Hugh Munto to swallow the said mixture, or part thereof, and the said Hugh Munro thereafter became more violently ill, and died early in the morning of the following day, on or about the 31st day of October 1837, and the said Hugh Munro was thus poisoned and murdered by her, and died in consequence of the said poison so administered by her to him, on both or one or other of the foresaid occasions.

The pannel pleaded not guilty.

No. 21. Elizabeth Jeffray, Glasgow, April 30 1838.

Murder.

It was proved that Mrs. Carl came to reside in the room adjoining that occupied by the pannel and her husband, at Whitsunday 1837. She was an old woman, and the pannel was generally very kind to her. On the 4th of October Mrs. Carl was confined to bed by illness, when the pannel took occasion to send her nephew, who was in attendance on her, out of the house, and in his absence prepared a liquid in a bowl, which the boy afterwards saw her administer to his aunt. He stated that he had, by the pannel's permission, tasted the contents of the bowl, and had afterwards vomited several times. Mrs. Carl, soon after drinking the liquid, was seized with violent vomiting, and died in great pain the following day. The pannel insisted on her being buried the same day on which she died.

Hugh Munro was a lodger in the pannel's house, earning his livelihood as a day labourer. On the evening of Friday the 28th of October, when he was in perfect health, he partook of some porridge prepared by the pannel, and was soon afterwards attacked with violent pain and vomiting. His illness continued all Saturday and Sunday. On the latter day the pannel gave him a powder, which she represented as rhubarb—after taking which he became worse, and died on Monday the 31st, with every symptom of having been poisoned.

The pannel, several times during his illness, was urged to send for a doctor, but objected to doing so; although it appeared that a medical man had at last been brought by her desire, who prescribed a rhubarb powder, which he gave to the pannel to administer. She had also, both in the case of Munro and of Mrs. Carl, refused either to go into the room in which they were, while they were dying, or to look at the bodies after death. Munro, as well as Mrs. Carl, was buried, by her desire, the same day on which he died. Suspicions having afterwards arisen as to the cause of death, the bodies were exhumed, one on the 4th, and the other on the 6th of November, when such a quantity of arsenic was found in the stomachs of both, as to leave no doubt on the minds of the medical witnesses that they had died by poison. The pannel was proved to have purchased arsenic on two occasions, under pretence of destroying rats, though there was no evidence of her having ever used it for that purpose, and no sufficient proof of there being any rats in the house.

No attempt was made, on the part of the prosecution, to attribute to the pannel any motive for poisoning Mrs. Carl,—unless her object was to try the strength of the potion to be afterwards employed against her other victim. It appeared that she had in her possession L.5, belonging to Munro, which she had stated to him her inability to pay, shortly before his death. This sum she since alleged she had restored to him, and that he had sent it to his brother in the Island of Skye. The brother was examined, to prove that he never received it; and from all the evidence it appeared, that the story of its having been paid was false.

No. 21. Elizabeth Jeffray, Glasgow, April 30 1838.

Murder.

One of the statements relied on by the pannel in her defence was, that during Munro's illness she had sent twice for a medical gentleman, Dr. Rankine. The servant of that gentleman having stated that no such message had come for him, while she was in the house, and that she was never out except when her master was in, and Dr. Rankine being afterwards under examination, as to the opinion which he had formed, after hearing the evidence, regarding the cause of the deaths of Mrs. Carl and Munro,—

HANDYSIDE, for the prosecution, proposed to ask him, whether he had been sent for by the pannel on the Sunday, as she alleged.

CRAUFURD, for the pannel, objected,—that it was incompetent to examine, on facts apart from his medical opinion, a witness who had been in Court during the previous part of the trial.

The objection was sustained, and the question found incompetent.

The proof having been concluded, the counsel on both sides addressed the Jury, and Lord Mackenzie summed up the evidence at great length.

The Jury, by a majority, found the pannel guilty as libelled, but unanimously recommended her to mercy.

In respect of which verdict of Assize, she was sentenced to be executed at Glasgow on the 21st of May.[1]

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[1] This sentence was carried into effect, the circumstances of the case not being considered such as to warrant any regard being paid to the recommendation of the Jury.

HIGH COURT.

May 8
1838.

Present,

THE LORD JUSTICE-CLERK,

LORDS MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE—*Innes—Davidson*

AGAINST

ROBERT MELDRUM AND CATHARINE REID—*Swinton.*

FALSEHOOD, FRAUD, AND WILFUL IMPOSITION.—The obtaining credit for a pair of shoes, under the false representations by the pannel that he was a workman in the Lochrin distillery, and entitled to a pension as a discharged soldier, found to constitute a relevant charge of Falsehood, Fraud, and Wilful Imposition.

No. 22. Robert Meldrum and Catharine Reid.

ROBERT MELDRUM was charged with two acts of Forgery, and two of Falsehood, Fraud, and Wilful Imposition; and CATHARINE REID with one act of Forgery and uttering a forged letter.

Falsehood, Fraud, &c.

One of the charges of Falsehood, Fraud, and Wilful Imposition against the pannel Meldrum was, that

"On the 8th of January 1838, &c., within the shop in South "College Street, Edinburgh, then and now or lately occupied by "Edward Dawes, shoemaker, you the said Robert Meldrum, did "wickedly, falsely, and fraudulently represent to the said Edward "Dawes that you were then employed as a workman at the Loch-"rin distillery; that you were then entitled to, and in the receipt of, "a pension as a discharged soldier; and that you were entitled to "and would receive payment of said pension at the then next day ap-"pointed for the payment of such pensions; although the truth was, "that you were not then employed, or about to be employed, at "the Lochrin distillery, and that you were not then entitled to or "about to receive any such pension: and you did, by means of the "foresaid false and fraudulent representations, or the like, induce "the said Edward Dawes to sell and deliver to you a pair of shoes "on credit, and you did fail to pay the price of the said shoes, and "did thus defraud the said Edward Dawes of the said pair of shoes, "the property, or in the lawful possession of the said Edward Dawes."

No. 22. Robert Meldrum and Catharine Reid, May 8 1838.

Falsehood, Fraud, &c.

SWINTON, for the pannel, objected to the relevancy of this charge in the Indictment, that there was no such assumption of a false character for the purpose of obtaining credit, as had been held necessary in all the adjudged cases of falsehood, fraud, and wilful imposition, (Alison, vol. i. p. 362), and that the failure to pay the price of the shoes was stated as the essence of the crime.

The Court repelled the objection.

The pannels pleaded not guilty, and a proof was led. In regard to this charge, the witness Dawes was examined particularly, as to whether he was induced to give the pannel credit for the shoes, solely in consequence of his representations as to his employment and expected pension, and deponed in the affirmative.

The Jury found the pannel Meldrum guilty as libelled, with the exception of the crime of Forgery; and found the libel against the pannel Reid not proven.

In respect of which verdict of Assize, the pannel Catharine Reid was assoilzied *simpliciter*, and dismissed from the bar; and the pannel Robert Meldrum was sentenced to be imprisoned in the Bridewell of Edinburgh, for the period of eighteen calendar months.

May 21 1838.

Present,

THE LORD JUSTICE-GENERAL—THE LORD JUSTICE-CLERK.

LORDS MEADOWBANK, MACKENZIE, MONCREIFF, MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE—*Innes*

AGAINST

HUGH CLIMIE—*Mure.*

THEFT—BREACH OF TRUST AND EMBEZZLEMENT.—A pannel being charged with having, while a servant in the employment of a com-

pany, received, from one of the partners, the sum of L.17 sterling, or thereby, in notes and silver money, for the special purpose of paying L.9 to one individual, and L.8, being the balance of said sum of L.17, to another, and having appropriated it—this found not to be a relevant charge of theft, principally on the ground that it was not set forth that the money was to be delivered by him *in forma specifica*.

HUGH CLIMIE was indicted to stand his trial at the Ayr Circuit, for the crime of "Theft, especially when committed by a servant on the property of his master."

No. 23. Hugh Climie, May 21 1838.

Theft.

IN SO FAR AS, on the 6th of March 1838, &c. the said Hugh Climie being then a servant in the employment of the Company carrying on business under the firm of William Hillhouse and Company, fleshers in Kilmarnock, and having been intrusted with, and received from William Gray, flesher in Kilmarnock, and one of the partners of the said Company, for, and on account of the said William Hillhouse and Company, the sum of L.17 sterling or thereby, in bank or bankers notes and silver money, for the special purpose of paying L.9 to William Manson, farmer at Whiteletts, &c. and of paying L.8, being the balance of said sum of L.17 sterling, to James Paterson, farmer at Shawhill, &c. the said Hugh Climie did, time aforesaid, in or near Kilmarnock, or at some other place to the prosecutor unknown, wickedly and feloniously appropriate to his own uses and purposes, and did wickedly and feloniously steal and theftuously away take the foresaid sum of L.17 sterling, the property, or in the lawful possession of the said William Hillhouse and Company, or of the said William Gray.

MURE, for the pannel, objected to the relevancy of the Indictment, on the ground that the *species facti* libelled constituted breach of trust, not theft.

LORD MEADOWBANK certified the case to the High Court of Justiciary. It came to be advised this day.

MURE, for the pannel, argued,—If the words, "and "did wickedly and feloniously steal and theftuously away "take," were struck out of the Indictment, it would contain a relevant charge of breach of trust. The terms of the charge are, that the pannel "having been *intrusted with*, and re- "ceived from William Gray," &c. *for, and on account of the Company*, a certain sum, did "wickedly and feloni- "ously appropriate it to his own uses and purposes."

No. 23. Hugh Climie, May 21 1838.

Theft.

A trust is implied in the very nature of the transaction. The pannel was " intrusted with money, not sealed up, " but open" (Alison, vol. i. p. 358.) The money was not given to him to be delivered *in forma specifica*. He was not bound to deliver nine particular notes to Manson, and eight others to Paterson. Suppose that he had employed the money in paying accounts of his own, and on the following day had procured money of his own to pay Manson and Paterson, but that his master meanwhile had taken alarm and caused him to be apprehended, he could not in these circumstances have been charged with theft. Neither would his crime have been theft—if he had paid one of his master's creditors with notes of his own, some of which afterwards turned out to be forged,—or if he had himself owed Manson L.2, and had discharged that debt, paying only L.7 of his master's. The distinction is drawn by Mr. Alison (vol. i. p. 358) between money when delivered open, and when contained in a sealed packet. And his doctrine is illustrated by the cases to which he refers, William Todd, (Glasgow, April 1825) George Leslie, Charles Learmonth, (April 1826) Donald Cameron, (Perth, Autumn 1827.) In recent practice, cases like the present have always been charged as breach of trust and embezzlement. Thus, Daniel Pratley (Glasgow, September 14 1836) pleaded guilty of that crime, under an Indictment, which charged him with having, while a waiter in the Old Royal Hotel, embezzled the sum of L.40 in bank notes intrusted to him by a traveller, for the purpose of being exchanged for his behoof for one note of that value, and was sentenced by the Lord Justice-Clerk and Lord Meadowbank to nine months imprisonment. A similar charge was found relevant by the Lord Justice-Clerk, Lord Gillies, and Lord Moncreiff, against William Robert Young, (High Court, June 5, 1837) who being a clerk in the employment of a Company, and having received from one of the partners a draft for L.40 to be cashed, " with special instructions to deliver the said " sum to him," drew the money from the bank and ap-

propriated it. And sentence of fugitation was passed against James Emslie, (Aberdeen, September 1837) who failed to appear on an Indictment for the same crime, committed under similar circumstances. Another point which is worthy of remark is, that the money was lawfully in the possession of the pannel. In the opinions delivered in the late case of John Smith, March 12, 1838, (*ante*, p. 50), a distinction was taken by some of the Court, founded on the point whether or not the first possession of the property grew out of the pannel's own act. And the circumstance of the articles appropriated being in the lawful possession of the accused, seems to have influenced the Lord Justice-Clerk in the case of David Walker (Stirling, September 3, 1836), in laying it down that "the facts detailed in evidence amounted to breach "of trust, the crime libelled, and not to the totally dif-"ferent crime of theft." (Swinton, vol. i. p. 296). The present Indictment charges the crime as being aggravated by being "committed by a servant on the pro-"perty of his master." But the *species facti* are very different from those which occur in cases in which such an aggravation is usually charged,—as, for instance, the case of a butler stealing his master's plate, his previous possession of which is *constructive*, not *actual*, as here. The case of Duncan M'Intosh (February 2, 1835), which at first sight appears an authority against the pannel in this case, seems to have been decided on the specialty that the money was to be delivered *in forma specifica*. (Appendix to Shaw and Dunlop's Reports, vol. xiii. p. 1168).

INNES, for the prosecution, answered,—In regard to the objection founded on the terms of the Indictment, the words "for and on account of the said William Hill-"house and Company," apply to the act of Gray, not to that of the pannel. No case has been cited, in which it has been found, that an Indictment for Theft, in circumstances similar to those charged, is not relevant. The cases referred to only prove that such a charge may be competently laid as breach of trust. But a person in-

No. 23. Hugh Climie, May 21 1838.

Theft.

trusted may commit a theft. Many cases may be relevantly charged, either as theft, or as breach of trust, or as both. And although the *species facti* may amount to the higher crime, it must always be competent to the prosecutor to indite for the lesser offence. The cases of a butler embezzling his master's plate, or of a person hiring a horse and subsequently appropriating it, are of every day occurrence as cases of theft. Yet it cannot be disputed that they might be charged under the *nomen juris* of breach of trust only. Mr. Alison (vol. i. p. 252) instances a variety of cases, in which the abstraction of goods by a person intrusted with them "for a special and "particular purpose, independent of any transfer of pro- "perty, as to be conveyed to a particular place, or sub- "jected to a particular operation," is theft, although with his usual caution (p. 258) he recommends that in such cases "the Indictment should be laid alternatively for "theft or breach of trust." But since the publication of his work this point has often been before the Court, and it was finally settled in the case of Duncan M'Intosh (February 2, 1835), which was pleaded before a full bench on a certification from the Glasgow Circuit. The *species facti* in that case were, that the pannel having, in the course of his employment as porter to a steam-boat company, received from the captain of a vessel belonging to the company, the sum of L.12. 9s. in bank notes and silver, for the special purpose of being delivered to a certain person, appropriated it. This was charged alternatively as theft or breach of trust, and was, after a full argument, decided to be theft. (Appendix to Shaw and Dunlop, Vol. XIII. p. 1168; cases of Murray and Tait, Alison, Vol. I. p. 254; Stewart, Perth, 1830; Nicol Sheriff, High Court, 1833). In the present case the aggravation, if relevant, implies that theft may be committed by breach of trust. The money is stated to have been delivered to the pannel,—not to be accounted for by him, but "for the special purpose of paying" L.9 to Manson, and L.8 "being the balance of said sum," to

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Paterson. The case is therefore precisely similar to that of David Field, January 22, 1838 (*ante*, p. 24).

MURE, for the pannel, replied,—In the case of M'Intosh, one sum was delivered to the pannel, to be delivered to one individual. It was on the circumstance of his having received "certain bank notes and silver, for the special purpose of being delivered," and of the legal possession of the money remaining with the owners or captain of the vessel, that the Advocate-depute of the time founded his argument. So Lord Moncreiff laid it down as the ground of his opinion; "M'Pherson (the captain), was in law, the *dominus*, and "the pannel was to deliver the money *in forma specifica*." And Lord Mackenzie's opinion is to the same effect. (Shaw and Dunlop, vol. xiii. p. 1169.) But the pannel, in this case, is in the condition of M'Pherson. He was intrusted with the money, not for the purpose of *delivering the same* to certain persons—not with instructions to pay L.9 *thereof* to one man, and the balance to another—but he received "L.17 sterling, *or thereby*, in bank or "bankers notes, and silver money, for the special pur-"pose of paying L.9 to William Manson, and of paying "L.8, being the balance of said sum of L.17, to James "Paterson." There was therefore no obligation to deliver the sum intrusted to him "*in forma specifica*,"—and on that ground alone, the offence with which he is charged in appropriating it, is not the crime of theft.

The LORD JUSTICE-GENERAL.—I considered this Indictment very deliberately at home, and with a reference to all the cases, both in the law of Scotland, and that of England, referred to by Mr. Alison, and I confess, that out of these cases I cannot form a consistent opinion on the subject. If it has been already decided, that appropriation of property by a person intrusted with it, as the pannel in this case was, amounts to the crime of theft, I have nothing more to say on the subject. But in general, I am very unwilling, that crimes which are very different in moral turpitude, and individual daring, should be classed under one category. I expressed that opinion in the case

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of Alston and Forrest, (March 13, 1837, Swinton, vol. i. p. 472), and it is an opinion which I still entertain. A theft may be aggravated—as the Indictment in this case states it to have been—by being committed by a servant on his master. If a servant picks his master's pocket, that is an aggravated species of theft, because his master's pocket ought to have been peculiarly sacred to him. But a case of that nature is very different from this. There was here no "*contrectatio fraudulosa*." The pannel is expressly stated in the Indictment to have been *intrusted* with a particular sum for a special purpose, and, instead of applying it to that purpose, to have appropriated it to his own use. Now, I have very great doubt, whether we ought to raise an offence of that nature into the crime of theft. It is worthy of remark that, beyond the usual latitude of three months, which is assumed in stating the date at which the pannel received the money, no particular time is mentioned at which he is said to have appropriated it. He might not have been able to find the parties to whom the payments were to be made; —he might have lodged the money in the bank, with the intention of honestly performing the trust reposed in him, and afterwards falling into difficulties, he might have formed and executed the design of embezzling it. If your Lordships think that the point is foreclosed by the decisions you have given in other cases, I have no desire that it should be opened up. But the opinion which I have expressed is that which has occurred to me upon the subject; and I will only add, that in those instances in which the charge was, that the pannel received the property, with instructions to deliver "*the same*," I think the case was different.

THE LORD JUSTICE-CLERK.—Concurring, as I do, with your Lordship in the opinion which you have just expressed, I do not think it necessary to go at length into the grounds of that opinion. I will merely state that I think I deliver this opinion in perfect consistency with the decisions which I have already had oc-

casion to pronounce in the other cases which have been referred to; and I should regret extremely that the authority in the case of M'Intosh should be departed from, in regard to cases in which the Indictment was similarly drawn. The charge here sets forth, that the pannel received "the sum of L.17 sterling, *or thereby*, in bank or "bankers' notes and silver money," of which L.9 was to be paid to one individual, and L.8 to another. He did not receive specific sums, made up into specific parcels, for each person to whom payment was to be made, as in the case of M'Intosh, who was not entitled to change one L.12 for another, but was bound to deliver the actual money which he received from M'Pherson *in forma specifica*. In regard to the case of Walker, it is very difficult to extract an opinion, which can guide a future decision, from a charge to a Jury proceeding on the evidence in a particular case, the circumstances of which were qualified by the provisions of the Friendly Society Act.

LORD MACKENZIE.—I concur. I am far from wishing to disturb the decision in the case of M'Intosh. I do not think that that decision was wrong, but taking the *species facti* in this case, as they are set forth in the Indictment, I do not think that the pannel received the money for the purpose of delivering it immediately, or *in forma specifica*, to the persons for whom it was intended. I do not found on the circumstance of its being set forth, that the pannel was "intrusted" with the money, because I agree with the public prosecutor, that theft and breach of trust may be committed at the same time. But the purpose for which the pannel is stated to have received the money, is that of paying L.9—not thereof—but L.9 to one person, and the balance of the sum,—not the remaining notes and silver,—but "the balance of the said sum "of L.17" to another person. Now, I do not think that in any case we have ever gone the length of deciding, that appropriation in these circumstances amounts to theft. If the pannel could prove that at the distance of a week he had paid these parties the same sum, I think his defence

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would be complete. Whether it is the law that cases may be stated as breach of trust, which are in reality theft, I do not know. But I have seen cases in which I had no doubt that the *species facti* amounted to theft, in which a plea of guilty to the alternative charge of breach of trust was received.

LORD MONCREIFF.—I do not know that I differ from any of your Lordships in principle, but I think it very important that the grounds on which our decision is founded should be rightly understood. If we are to hold that the true meaning of the Indictment is not that the pannel received the money, for the special purpose of paying it to the persons named, then I can understand why it is not to be viewed as a charge of theft. But the statement is, that he received L.17, "for the spe-"cial purpose of paying L.9, to Manson, and of pay-"ing L.8, being the balance of said sum, to Paterson." There might, undoubtedly, arise on the evidence a defence, such as was anticipated by Lord Mackenzie. But the question here is not on the evidence, but on the relevancy of the charge as laid, and the difficulty I have is, whether it is not sufficiently set forth, that the very sum which the pannel received from Gray he was to pay to Manson and Paterson. I do not, however, differ in principle, if your Lordships hold that this is not sufficiently set forth.

LORD MEDWYN.—I concur with the opinions expressed by the Lord Justice-Clerk and Lord Mackenzie. Theft and breach of trust are kindred crimes, and I do not say that it is possible to reconcile all the cases, in which one or other of them has been found relevantly charged. But the *species facti* here differs from the case of M'Intosh, and still more from that of Tait and Murray, (on which the decision in M'Intosh's case proceeded.) The charge there was that Murray received the money, "with special instructions to carry *the said money* "immediately" to the bank, "and pay *the same* to the cre-"dit of the cash account" of the company, of which he was

clerk, (Shaw, p. 225.) I find, from my notes in the case of M'Intosh, that the Court held that the charge would have applied better to the precedent in Murray's case, if it had been stated that the money delivered was to be paid *immediately* to the party for whom it was intended. But, at all events, it was to be paid *in forma specifica*. That is not clearly expressed here, and, therefore, I think that this Indictment, though, perhaps, liable to a little ambiguity, as pointed out by Lord Moncreiff, still does not, on the whole, contain a relevant charge of theft.

LORD COCKBURN.—I do not wonder that we should differ upon this question, because the distinctions between theft and breach of trust are the most evanescent and slimmest known in our criminal law. My only anxiety is, that the general rule of law, upon the subject, should not be impinged upon. That rule I hold to be, that where there is no transfer of the property, but the subject is delivered for a certain specified object, the appropriation of it is theft. If we are agreed upon that rule, the only question regards the particular terms of this indictment. And the difficulty which I have on that point, arises out of the question, whether the very money which the pannel received was not to be paid to Manson and Paterson. No man ever desires money to be delivered in *forma specifica*; but, is not the plain meaning of the indictment that this was intended to be done? If, however, there is a doubt in the minds of the Court, as to the relevancy of the charge, I am for giving the prisoner the benefit of that doubt.

LORD MEADOWBANK.—I concur in the anxiety expressed, that our decision in this case should not affect the general law on the subject. If I had been to decide this point when it arose at Ayr, I should certainly have found this a relevant charge of theft; but I am now convinced that in so doing I should have done wrong, because I think there is a doubt whether it is sufficiently stated, that the delivery was for a particular purpose, that is, whether the pannel was bound to deliver to the persons named in the

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Indictment, the specific notes and silver money which had been given to him.

The Court accordingly sustained the objection to the relevancy of the Indictment, as laid for the crime of theft, and the pannel was re-committed, on a new warrant, for the crime of breach of trust.

HER MAJESTY'S ADVOCATE.—*Sol.-Gen. Rutherfurd—Innes*

AGAINST

BERNARD GREENHUFF AND OTHERS.—*Robertson—Wilson.*

KEEPING A GAMING HOUSE.—STATUTES 12TH GEO. II. C. 28, AND 18TH GEO. II. C. 34.—An Indictment under these Statutes against four pannels, who had set up a Gaming House in Edinburgh, found incompetent, on the ground that the Statutes do not extend to Scotland.

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BERNARD GREENHUFF was brought before the Court on the 19th March 1838, charged along with Charles Staten, Charles Stockwell, and Monnington Parry, with contravention of the act 12th Geo. II. cap. 28, entitled, "An act for the more effectual preventing of excessive "and deceitful gaming," by which it is enacted, (section 1.)

"That, if any person or persons shall, after the twenty-fourth day of "June one thousand seven hundred and thirty-nine, erect, set up, con- "tinue or keep, any office or place, under the denomination of a sale or "sales of houses, land, advowsons, presentations to livings, plate, jewels, "ships, goods, or other things, by way of lottery, or by lots, tickets, "numbers or figures, cards or dice, or shall make, print, advertise, or "publish, or cause to be made, printed, advertised, or published, pro- "posals or schemes for advancing small sums of money by several per- "sons, amounting in the whole to large sums, to be divided among "them by chances of the prizes in some publick lottery or lotteries es- "tablished or allowed by act of Parliament, or shall deliver out, or cause "or procure to be delivered out, tickets to the persons advancing such "sums, to entitle them to a share of the money so advanced, according "to such proposals or schemes; or shall expose to sale any houses, lands,

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"advowsons, presentations to livings, plate, jewels, ships, or other goods, "by any game, method, or device whatsoever, depending upon, or to "be determined by any lot or drawing, whether it be out of a box or "wheel, or by cards or dice, or by any machine, engine, or device of "chance of any kind whatsoever; such person or persons, and every "or either of them, shall, upon being convicted thereof before any "one justice of the peace for any county, riding, or division, or "before the mayor, or other justice or justices of the peace for "any city or town corporate, upon the oath or oaths of one or "more credible witness or witnesses (which said oaths the said "justices of the peace and mayor are hereby authorised, impowered "and required to administer) or upon the view of such justice or "justices, or the mayor, justice or justices, for any city or town corpo- "rate, or on the confession of the party or parties accused, shall forfeit "and lose the sum of two hundred pounds, to be levied by distress and "sale of the offender's goods, by warrant under the hands and seals "of one or more justice or justices of the peace of such county, riding, "division, city, or town, where the offence shall be committed; which "said forfeitures when recovered, after deducting the reasonable charges "of such prosecution, shall go and be applied, one-third thereof to the "informer, and the remaining two-thirds to the use of the poor of the "parish where such offence shall be committed, excepting the said two- "thirds of such forfeitures which shall be incurred by, and recovered "upon, any person or persons within the city of Bath, which said two- "thirds shall go and be applied to and for the use and benefit of the "poor residing within the hospital or infirmary lately erected for the "benefit of poor persons resorting to the said city for the benefit of the "mineral waters, after deducting the charges of conviction as afore- "said:"

As ALSO, with contravention of the act 18th Geo. II. cap. 34, entitled, "An act to explain, amend, and make "more effectual the laws in being to prevent excessive "and deceitful gaming, and to restrain and prevent the "excesssive increase of horse-races," by which it is enacted, (section 1.)

"That from and after the 24th day of June 1745, no person or per- "sons, of what condition soever, shall keep any house, room, or place "for playing, or permit or suffer any person or persons whatsoever, "within any such house, room, or place, to play at the said game of "roulet, otherwise roly poly, or at any other game, with cards or dice, "already prohibited by the laws of this realm; and in case any person "or persons whatsoever shall keep any such house, room, or place for "playing, or permit or suffer any such person or persons as aforesaid to

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" play at the said game of roulet, otherwise roly-poly, or at any other " game with cards or dice, already prohibited by law, such person or " persons so offending shall incur the pains and penalties, and be liable " to such prosecution as is directed in and by an act made in the twelfth " year of the reign of his present Majesty, intituled 'An act for the " 'more effectual preventing excessive and deceitful gaming:' "

IN SO FAR AS, the said Bernard Greenhuff, Charles Staten, Charles Stockwell, and Monnington Parry did, all and each, or one or more of them, within the house in High Terrace of Edinburgh, occupied by Ann Cameron or Rutherford, widow, on or about the 10th of October 1837, set up, and did, for thirty days or thereby immediately following, keep a house, room, or place for playing, and did permit and suffer various persons, particularly Charles Durie, doctor of medicine, residing in Hamilton place, Stockbridge, Edinburgh, William Blackwood, Esquire of Colton, in the parish of Dunfermline, and county of Fife, and others, within such house, room, or place, to play at the game of roulet, otherwise roly-poly, and at other games with cards and dice prohibited by the laws of this realm previous to the date of the statute last above libelled.

WILSON, for the pannels, having objected to the relevancy of the Indictment, the Court ordered Informations on the subject.

In the Information for the prosecution it was argued:—

The Indictment charges the pannels with setting up and keeping a gambling-house, in contravention of certain statutes libelled. The objections taken to its relevancy are two-fold. 1*st*, That the statutes founded upon are not applicable to Scotland. 2*d*, That Indictment is not a competent form of proceeding under these statutes, even if they were held to extend to Scotland.

I. Upon the first objection it is admitted, that the language of the statutes libelled has no special reference to Scotch courts or forms of procedure, from which it can be certainly affirmed, that the acts were intended by the legislature to extend to Scotland; but it is an important subject of consideration, whether an act of the British Parliament, regarding a matter of general polity, can be presumed, without express declaration or plain intimation, to include only one part of the British empire.

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It can scarcely be disputed, that statutes passed since the Union, on matters of general polity, must be held to extend to both kingdoms, in the absence of any direct intimation or implied intention of the Legislature to the contrary. This is stated by Dwarris (vol. ii. p. 991.) in the following terms:—"Acts of Parliament in general "passed since the Union extend to Scotland; but when "a statute is not applicable to Scotland, and when Scot-"land is not intended to be included, the method is to "declare by *proviso* that it does not extend to Scotland;" where the author uses the express words of his authority, Lord Mansfield, in an important case respecting the privileges of the town of Berwick, decided in 1759, (2 Burrows, p. 853.) Lord Mansfield's authority is entitled to the more weight, that it expresses the understanding of that great lawyer with regard to the practice of Parliament within twenty years after the passing of the first of the two statutes now founded upon, and only fourteen years after the date of the second.

The subject of these statutes, the prevention of common gaming-houses, is a subject certainly of general interest, equally applicable to Scotland as to England, in as much as it has for its object to put down immoral and dangerous practices, which had been prohibited by previous acts of Parliament, both since the Union, and in England before the Union, though it would appear ineffectually.

In Scotland, the only act previous to the Union upon this subject, (1621, c. 14.) ordained, "That no man shall "play at cards nor dyce in any common house, town, "hostelrie, or cooke's-houses, under the pain of fourty "pounds money of this realme,—to be exacted off the "keeper of the saids inns or common-houses for the first "fault, and losse of their liberties for the next." It is quite evident that the penalty prescribed in this statute, even if it be not considered in desuetude, is inapplicable, and would be inefficient as a remedy for the evils of gaming-houses at the present day. In truth, it serves only to

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shew that the mischief is one which the common law could not reach; and this rendered it equally expedient in Scotland, as in England, to provide an efficient statutory remedy.

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But, if there be no express declaration, nor any thing in the nature or subject of the acts, to imply their limitation to England, the objection must rest solely upon the terms being applicable only to English practice, and incapable of receiving effect in the courts of this country.

It might well be maintained, that although the language is certainly that of an English lawyer, there is nothing in either of these acts that is inapplicable to Scotland, or that cannot be brought into operation in the Courts, and according to the procedure of this country. It is unnecessary, however, to direct attention to both of these statutes. The former—the act 12 George II.—is libelled upon, only because it is referred to in the latter, which adopts the penalty prescribed by it. It would, therefore, have been of no consequence, although the act of 12 George II. had contained an express exclusion of Scotland, or though it had been passed before the Union of the kingdoms.

With regard to the second statute libelled upon—the act 18 George II. c. 34,—the title, preamble, and first and second sections, are of the most general character, and cannot be said to have any thing peculiar in their terms, from which it can be inferred that they are intended for one country more than another.

The third section refers to a difficulty that had occurred in English practice, in executing the previous act of 9th Anne, chap. 14, for want of a provision authorising courts of equity to decern for the penalty; and such authority is thereby conferred. The difficulty, however, was not felt in Scotland; and the remedy of course was not adapted for this country.

The fourth section gives power to summon witnesses, and to fine them for not appearing, or for refusal to give evidence, in terms which seem to have in view courts of

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Justices of the Peace, but which are equally applicable to such courts in Scotland as in England, with the exception of the concluding words authorising commitment to jail "without bail or mainprize." It is admitted that the last term is purely English, and that the provision probably had reference to English practice alone; the alternative word used, however, is equally familiar in Scotch as in English law; but even if the whole clause be held inapplicable to Scotland, it only follows, which is indeed quite plain, that no such provision was required in this country.

The fifth, sixth, and seventh sections contain no expressions peculiar to the law of England, or from which any inference can be fairly drawn in support of this objection.

The eighth section enacts that persons winning or losing above a certain sum may be indicted "either before his "Majesty's Justices of the King's Bench, assize, jail de-"livery, or grand sessions." Here it is unnecessary to argue, that "his Majesty's justices of assize or jail delivery," are descriptions of judicatures quite as intelligible in Scotland as in England; because, whatever may have rendered this clause necessary in England, it was not necessary in Scotland expressly to declare that indictment shall be competent, since by the law of Scotland every thing which is an offence or crime, either at common law or by statute, is the subject of indictment.

The ninth, tenth, and eleventh sections are quite general in their terms, and cannot be founded upon to any extent in support of the objection.

It is admitted, that there has been hitherto no prosecution under this statute in Scotland; but it is not to be inferred that it has been confessed not to extend to this country, since no prosecutions have been had for this offence under any statute, or at common law; and it is to be presumed, therefore, that the offence had not occurred, or had not been discovered, rather than that it could be passed over, as one which it was impossible, or not desirable to check.

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The subject of the statute is of the most general nature. Its provisions are easily applicable to Scotland; and the only foundation for this objection is, that it contains certain phrases appropriate to the law of England. These are—the provision for imprisonment "without bail or "mainprize," and the power given, (§ 4), to indict certain offences under the act, "either before his Majesty's Jus-"tices of the King's Bench, Assize, Gaol Delivery, or "Grand Sessions." But such expressions, and others even more exclusively bespeaking an English origin, occur in many acts which have either been declared by Parliament itself, or have been found by the Courts of Scotland, to apply to this country. One of these is the statute commonly called the Usury Act. (12 Anne, cap. 16.) Whether we look at the preamble, which has reference to the rate of interest in England alone, or to the penalties and the mode of enforcing them, which, according to the strict letter of the act, it would, in many cases, be impossible to bring into operation in Scotland, it is sufficiently manifest that this statute, drawn by an English lawyer, had not in view any of the details of Scotch forms of process, by which it could be put into execution in this country. Being, however, a statute of general polity, and concerning a matter that clearly ought to stand on the same footing in both countries, it became, soon after the date of its passing, and has continued till the present day, a recognized and admitted ground of action in all the courts of Scotland.

The act of Parliament concerning the preservation of stranded vessels, (12th Anne, cap. 18,) refers in the preamble to two statutes of King Edward the First of England. Its whole phraseology is applicable to English practice. The persons officially authorized to carry it into execution are enumerated by their English titles. It provides that persons sued for their conduct in pursuance of the act, may plead the general issue;—with many other provisions applicable to jury trials in civil cases, which had not then been introduced in Scotland. The ex-

tension of this act to Scotland was the subject of recent litigation; and it was settled that the act did extend to Scotland, (Commissioners of Customs and Excise *v.* Lord Dundas, 25th May 1830, F. C.)

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The act against unlawful combinations among the workmen of the woollen manufacture, (12th Geo. I. c. 34,) has the same expressions, "without bail or main-"prize." It prescribes "warrants under the hands and "seals,"—takes away "the benefit of clergy," and has many other references to English forms, which did not prevent it being recognised by the Scotch civil court as applicable to Scotland, (Monteith *against* Blackie, 2d Feb. 1827, 5 Shaw and Dunlop, p. 280.)

The apprentice act, (20th Geo. II. c. 19,) which has been held to extend to Scotland, (Guthrie *v.* Cowan, 10th Dec. 1807,) contains a provision, that no *writ* of *certiorari*, or other process shall issue, to remove any proceedings under the act into any of the courts at Westminster.

In like manner, the acts for punishing persons employed in certain manufactures for embezzling the materials entrusted to them (22 Geo. II. c. 27; 17 Geo. III. c. 56.) have been framed with most minute reference to English forms of procedure. The same provisions above mentioned, regarding "pleading the general issue," "non-"suit," "discontinuance," "demurrer," "triple costs," and other trite phrases of English law language occurring in them, prove that they were drawn with no special reference to the practice of Scotland; but, nevertheless, their subject matter being one of general policy, and there being no difficulty to put the acts in execution, without reference to the minute provisions and remedies adapted to English form, it has been held that they are equally applicable to Scotland. (Mackay *v.* Bond. 19th Nov. 1813.)

All the excise acts, which necessarily include both kingdoms, and all the acts connected with the revenue, contain more or less provisions and references which have

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a distinct application to English forms of law. Some of them (as 12 Anne, st. 2, c. 9.) expressly enacted for *Great Britain*, and containing numerous provisions specially applicable to Scotland, yet refer to and confirm acts of the English Parliament preceding the Union.

The only other statute which it seems necessary to quote, is one specially mentioned in the act now libelled on. This is the statute of Queen Anne, for the better preventing of excessive and deceitful gaming, which, although it contains continual references to the law and practice of England, was nevertheless enforced soon after passing in Scotland, and has, so far as regards its civil effect, regulated the law of Scotland as to gaming contracts from its date to the present day. (Elchies, Pact. Illicit. Nos. 9. 10, 13, 14.)

II. It is argued for the pannels, that the only form in which proceedings under the act against the keepers of gambling-houses can be had, is that prescribed by the fourth section of the act, which points at information rather than indictment, and evidently has in view a bench of justices rather than a high court of criminal judicature. But upon attending to the terms of that section, it appears that they are simply permissive, and at the same time that it is expressly declared to be intended "for the "more easy conviction of persons offending against this" and the other gaming statutes; and while certain powers are given to "such persons who had jurisdiction" under these statutes, yet it is not set forth who those persons are, still less is there any attempt to exclude a court of higher jurisdiction than that which was probably contemplated in this section.

By the law of Scotland, every crime or offence, whether declared to be so by statute, or which is so of its own nature, and at common law, is subject to indictment, unless the legislature has expressly interposed to declare otherwise. It is no doubt true, that large classes of offences never come into the Hight Court, nor are made the sub-

ject of indictment; but this is a question of expediency only; and there seems no reason to doubt, that the most petty offence at common law, or the most trifling transgression against a statute, is by the law of Scotland indictable.

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The law of England seems in this respect to be similar to that of Scotland. It is settled, in the first place, in the English law, that an indictment is competent against persons guilty of disobedience of a statute that simply commands or prohibits a thing of public concern, although no penalty is prescribed, nor any means laid down for enforcing the act. (2 Dwarris, p. 677.) Secondly, although it has been questioned whether, where a statute creating a new offence gives a penalty, and directs how it shall be recovered, the offence can be punished in any other way than that directed by the statute,—it has been settled that it may be punished by indictment, where there is a general prohibitory clause in the statute, (Ibid. p. 678,) as is the case here. "Where an offence "is created by act of Parliament, an indictment will "lie where there is a general prohibitory clause in the "statute, though there be afterwards a particular pro-"vision, and a particular remedy given." (Ibid. 680.)

III. It is objected that the minor proposition charges the pannels with keeping a house for playing at the game of roulet, "and at other games with cards and dice, pro-"hibited by the laws of this realm previous to the date of "the statute;" and that this is a vagueness, which does not give the pannels a fair intimation of the charge against them, in order to their defence. But the general words objected to, are those of the statute founded upon in the major proposition, and as such, fall within the strict accuracy of a logical indictment. There was some convenience anticipated from their insertion, as meeting any objection to leading evidence with regard to other games than that specified by name; at the same time, the prosecutor must prove that the game of roulet was one of

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the games played in this gambling-house, or otherwise he will not be entitled to a verdict under this Indictment.

In the Information for the pannels it was argued :—

(I.) The two statutes, viz., the act 12 Geo. II. c. 28, and the act 18 Geo. II. c. 34, on which the Indictment is laid, and the partial recital of which is made to supply the place of a major proposition, never were intended to apply, and ought not in law to be held to apply to Scotland.

It is admitted, that generally speaking, acts of Parliament passed since the Union of England and Scotland, extend to Scotland, and that, when a statute is not applicable to Scotland, or when Scotland is not intended to be included, the method in general is, to declare by *proviso*, that the act does not extend to Scotland. It is admitted, also, that in the two statutes libelled, there is no such *proviso*. On the other hand, it will not be disputed by the public prosecutor, that many statutes have been passed since the Union, containing no such *proviso*, but which have been either generally understood, or expressly and judicially held not to extend to Scotland. In cases of doubt, therefore, as to whether a particular statute extends to Scotland or not, it becomes necessary to attend to the intendment of the statute as declared in its own preamble, as also, to the machinery introduced or referred to, as the means by which the purposes of the statute are to be carried into effect.

Now, the preamble of the statute first libelled on in the present case, being the act 12 Geo. II. c. 28, proceeds on the recital of previous statutes which could not possibly extend to Scotland, having been passed before the Union. Its principal object is of a *declaratory* nature. It is for the purpose of removing doubts in regard to the construction and operation of a statute confessedly limited to England and Wales, and declaring that the games there enumerated came within the description of games and lotteries prohibited by that English statute.

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It is, moreover, to be kept in view, that at the passing of this act, there existed in Scotland acts of Parliament in full force, expressly applicable to all the games so anxiously enumerated in the British statute libelled. Indeed, the statute, 1621, c. 14, expressly applies to *all games* played with cards or dice, and enacts the law in regard to these. Now, if it had been intended by the Legislature that the English laws against gaming were in Scotland to be substituted for, and to supersede those Scotch laws on the subject then in existence, the statute in question would surely have contained a clause repealing the statute of James VI., now referred to, more especially as by this statute the oath of one witness is declared sufficient to warrant conviction,—a provision directly at variance with the settled law of Scotland regarding evidence. But this statute contains no clause repealing the Scotch statute, nor does it purport to intend or effect any alteration of the law as then existing in Scotland. It is therefore humbly apprehended, that that part of the Scotch laws, notwithstanding the passing of the statute 12th Geo. II. c. 28, still remained protected by the articles of Union, which declared, that with the exception of the laws relating to trade, custom, and the excise, *all the other laws of Scotland* should remain in force, until they should be altered by the Parliament of Great Britain.

It seems to be conceded, on the part of the prosecution, that this Statute of the 12th Geo. II. does not extend to Scotland, and it is said that this is a matter of no importance. It appears perfectly clear, however, that the concession necessarily was made, and that it is of importance. The act 12 Geo. II., as already shewn, proceeds on the narrative of various acts passed before the Union, and the leading enactment, being the one libelled on, (and for the penalty contained in which, and nothing else, the prosecutor, under this Indictment, must contend that the pannels are liable), is applicable to lotteries only. The statute then farther adds a variety of games to those which

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were illegal under the former English statutes; and it is quite clear, that the Scotch statute, 1621, cap. 14, as to playing at cards or dice, "in any common house, town, "hostelrie, or cookes' houses," for which the keepers of such houses are liable in penalties,—being the only Scotch statute upon the subject,—was not in the view of the legislature. The whole of the subsequent provisions of the statute, 12 Geo. II. cap. 28, are also plainly English. There is an appeal given to the Quarter-Sessions, and if the judgment be affirmed, the appellant is to be liable in treble costs, and, indeed, nothing can be clearer than that this statute has no connection with Scotland.

The pannels do not mean to contend, that this is, in itself conclusive as to the subsequent statute, 18 Geo. II. cap. 34, which might, notwithstanding, have been meant to extend to Scotland. But it is a little remarkable, that if the leading statute, which alone prescribes the punishment, and to the penalties of which, as recoverable under that statute, the accused can only be amenable, should be applicable to England only, and yet that the supplementary statute should be held to extend to Scotland. The penalties are recoverable before a Justice of the Peace, and an appeal is to lie against the conviction to the Quarter-Sessions in England, and all under a statute admittedly extending to England only,—and yet the proposition to be made out, on the part of the Crown, is, that by a subsequent supplementary statute, these penalties so recoverable, and liable to such review, have been incorporated into the law of Scotland, and may be recovered under indictment in the High Court of Justiciary, against a conviction in which Court, it must be conceded, no appeal lies to any other tribunal whatever.

That second statute libelled on, is the 18th Geo. II. c. 34, and is entituled,—"An act to *explain*, amend and "make more effectual the laws in being, to prevent "excessive and deceitful gaming, and to restrain and "prevent the excessive increase of horse-racing." It is evident that the laws referred to, as requiring ex-

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planation and amendment, are the *English* statutes then in existence. Indeed, on the margin of the statute, there is an enumeration of the statutes referred to, beginning at 33d Henry VIII. c. 9, and coming down to the 12th Geo. II. c. 28. And from the enacting clauses, following the preamble, it is clear, that the principal object of the new statute was to add the English game of roulet, or roly-poly, to the enumeration of games prohibited by the 12th Geo. II. c. 28, and the previous statutes there quoted. There is not a single word or clause, indicative of any intention to extend the laws referred to to Scotland, or to abolish the existing Scotch laws on the subject of gaming. On the contrary, the whole legal phraseology used, is such as would be applicable only to prosecutions in England.

It is admitted, on the part of the prosecution, "that the "language of the statutes libelled, has no special reference "to Scotch Courts or forms of procedure, from which it can "be certainly affirmed that the acts were intended by the "legislature to extend to Scotland." But still it is added, that these acts may apply. Now, really this is a very gentle way of putting the case; for unless it can be shewn that it was intended by the legislature to extend the previously existing English law to Scotland, it will not lightly be presumed that any such effect has accidentally been attained, without any definite purpose or intention of the legislature to effect that result. The act of the 12th Geo. II., applied to the games of ace of hearts, pharaoh, basset, and hazard. This act applies to roulet or roly-poly. It is not said that the mischiefs of the first four of these games existed in Scotland, and it is admitted that the 12th Geo. II. does not extend to Scotland. It cannot be said, that in the time of Geo. II. this game of roulet or roly-poly, whatever it may be, prevailed in Scotland. But if the evil has been so recently felt in Scotland, for the first time,—if the other four games mentioned in the first statute were legislated upon exclusively with regard to England—and if, in the time of Geo. II.,

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within a few years of the first statute, roly-poly was added to the list of prohibited games in a supplementary statute explaining the law of England,—how is it ever to be maintained, that this explanatory statute extends the penalties of the original English Act into Scotland?

It is unnecessary to enter into any examination of the cases, with respect to the extension of the usury laws, the laws against unlawful combinations, the Apprentice Act, and the acts for abolishing embezzlement in manufactories; for the pannels do not dispute the general proposition deduced from all these instances, namely, that the circumstance of the phraseology in any particular statute being more applicable to the law of England than to the law of Scotland, is not sufficient, in itself, to exclude the application of such statute to Scotland. The occurrence of such words as mainprize, benefit of clergy, treble costs, writ of *certiorari*, *demurrer*, &c., which are plainly English only,—unknown in our law, and inapplicable to our proceedings,—will not be sufficient to limit the application of a British statute to England only. But the whole statute must be taken together, and whereas on the one hand, the use of Scotch law language, and certainly the nomination of Scotch Courts, might decide that a British statute did extend to Scotland,—on the other, when the point to be determined is the plain purpose and intendment of the legislature, the exclusive use of English phraseology—the exclusive mention of English courts—the exclusive introduction of English machinery, for giving effect to the statute, are matters of material importance in determining whether the act extends to Scotland or not, and though certainly not conclusive, strengthen an argument rested upon this foundation, that the particular act in question is explanatory of a previous English statute, and that the evil to be remedied by the new statute did not exist in Scotland.

It is submitted, that neither the one statute nor the other had in view this part of the United Kingdom. It is now nearly a century since the last of these statutes

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passed, and it is admitted that this is the first time they have ever been endeavoured to be enforced within this realm. It would have been a little singular, if in 1745 (when other games than roly-poly were on foot in Scotland), the British legislature, in amending an English statute, should have had in view the probable introduction of this particular game into Scotland, and prospectively devised a remedy for an evil which has only been felt now, for the first time, in the year 1838. Nor let it be said, that if this crime actually was committed, it shall go unpunished; for the Scotch statute is of very general import, and a sitting tribunal may be found for enforcing its penalties, without a solemn indictment before this Court, and an investigation, which,—even if it were not to lead, in point of fact, to the distinctions between the English game of roly-poly and the French game of roulette, (which is strangely supposed, upon the principle, it is supposed, of *idem sonans*, and with the aid of a little mispronunciation, to be the same with roulet),—would not, with all due deference, upon the shewing of this Indictment itself, be so befitting the dignity and the gravity of this high tribunal, as it would be becoming, if the charge be really true, a summary inquiry in the police court, or at the highest, before a Justice of the Peace.

II. Supposing the statutes libelled not to be held limited to England and Wales, the present prosecution in this Court is not warranted by those statutes, and is incompetent.

By the Act 12th Geo. II. c. 28, § 1, a special mode of prosecution and a particular punishment are enacted. The playing at roulet, or roly-poly, is for the first time created an offence by this statute, which proceeds on the assumption that that offence was not punishable before,—as it certainly was not in England. Now, according to the authority of Mr. Dwarris in his Treatise on Statutes, it is settled law, that "where the statute en-"acts that the doing any act not punishable before, shall for "the future be punishable in such and such a particular

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"manner, there the particular method prescribed by the "act must be specifically pursued, and not the common "law method of indictment." (Dwarris, vol. ii. p. 679.)

In the present case, the keeping of a place for playing at the game of roly-poly is prohibited by the act 18 Geo. II. c. 34, and is declared to be punishable in the manner pointed out in the act 12 Geo. II. c. 28, viz. by the forfeiture of a certain sum of money, on the conviction of the offender before a Justice or Justices of the Peace of the county, or the Mayor or Justices of the town corporate where the offence was committed. Suppose the offence charged in this case, therefore, had been committed in England, and an indictment had been laid before any of the Supreme Courts in England, it is clear, that even in that country, such indictment would have been quashed. *Multo magis* ought a similar result to follow here.

It is said that the most petty offence at common law, or the most trifling transgression against a statute, may be the subject of indictment in this Court; and this seems to be considered as a satisfactory answer to the present objection. As the pannels do not dispute the general powers of the Court, it is quite unnecessary to enter into any argument upon that subject. At the same time, they must take the liberty of observing, that they are not aware of any case, in which the Court of Justiciary have allowed a trial to proceed under a solemn indictment, where the only conclusion which could follow in point of punishment, was a mere pecuniary fine. But the point lies here. The act, 18 Geo. II. adopts the penalties of the 12th Geo. II. Now, if the 12th Geo. II., as seems to be conceded, and at all events is proved, do not extend to Scotland, and if the penalties under that statute could not form a subject of indictment in the High Court of Justiciary,—where is the competency of the present proceeding? By that statute, however, the person was to be tried before one Justice of the Peace in England, upon the oath of one or more credible witnesses, and he was to for-

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feit and lose the sum of L.200, to be levied by distress and sale of the offender's goods; and by the 5th section he was entitled to appeal to the next Quarter-Sessions. The privilege of appeal, and the right of being tried in a petty court for a petty offence, were thus conferred upon him; and yet it is contended, that while this is the only penalty, and the only mode of trial, to which the English statute subjects him, he may, by the incorporation of that statute with the law of Scotland, be subject to Indictment before the High Court of Justiciary. The pannels humbly submit, that this is inconsistent with all principle and sound legal reasoning.

III. In the *last* place, the charge in this Indictment is too vague. Thus, in the minor proposition, the pannels are accused of keeping a house, and there permiting various persons to play at the game of roulet otherwise roly-poly, "*and at other games with cards and dice, prohibit-*"*ed by the laws of this realm previous to the date of the* "*statute last above libelled.*" It is clear, that the parties are entitled to be informed by the prosecutor what "other "games prohibited by the laws of the realm," previous to the passing of the act of the 18th Geo. II., they are accused of permitting to be played; and if the case is to go to trial on this Indictment, the words above quoted will fall to be struck out.

The case came to be advised this day, when the following opinions were delivered:—

THE LORD JUSTICE-GENERAL.—My impression is, that these acts of Parliament, particularly the last, do extend to Scotland. It is admitted for the pannels, that, generally speaking, acts of Parliament passed since the Union do extend to Scotland, and that when this is not intended to be the case, a special *proviso* to that effect is inserted in the act. There is also another way of excluding Scotland. Many acts of Parliament are stated to apply only to England and Wales, and the town of Berwick-upon-Tweed. But that is not the case in regard

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to the acts founded on in this Indictment. These acts are said to be British acts. They are more;—they are acts of a Parliament which is the Parliament of Scotland, and, since the Union, of Ireland also. The terms of the act 18th Geo. II. c. 34, are as general as possible,—declaring, "that from and after the 24th day of June "1745, no person or persons,"—it is not said Englishman or Scotsman,—"of what condition soever, shall keep any "house,"—it is not said in England, but "any house, "room, or place for playing, or permit or suffer any per-"son or persons whatsoever, within any such house, "room, or place, to play at the said game of roulet, other-"wise roly-poly, or any other game at cards or dice al-"ready prohibited by the laws of this realm." No doubt these acts refer back to English acts of great antiquity; and some of their terms are more applicable to England than to Scotland. The punishment, too, which they prescribe, is a pecuniary penalty recoverable in certain courts in England. It may, for any thing we know, be necessary in the law of that country, to give particular courts jurisdiction in particular crimes; but that is not the case in Scotland. The Court of Justiciary has jurisdiction, both by common law, and in crimes created by statute, in every case, unless where it is specially excluded. And the instances referred to in the Information for the prosecution prove, that we have no difficulty in finding means of explicating that jurisdiction, even in cases where the framers of the statutes in question seem to have left Scotland entirely out of view.

The LORD JUSTICE-CLERK.—I am very far from thinking that this is a point unattended with difficulty; and still less can I be of that opinion, after hearing the view of the question taken by your Lordship, with which I regret that I cannot concur. The admission for the prosecution, that the act 12th Geo. II. c. 28 does not apply to Scotland, I consider very important. It is argued that the later statute, that of 18th Geo. II. c. 34, does apply to Scotland. But it is important to observe, that re-

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ference is made in the preamble of that act, to "the many "good and wholesome laws, now in being, for preventing "excessive and deceitful gaming." On referring to the act, as printed in the Statute-Book, I find a reference on the margin to a variety of acts, from the 33d Henry VIII. c. 9, to the 12th Geo. II. c. 28. I agree that when the legislature passes a general public act—which is not intended to apply to Scotland—this country ought to be specially excluded; and I am clearly of opinion, that the Court has rightly decided, that the mere use of English law terms will not induce them, in cases where the subject of legislation is one of common interest to both countries, to hold that an act does not apply to Scotland. But, in the present case, the preamble of the act is founded on the statement, that the laws then in being on the subject were insufficient, and most of the acts referred to on the margin do not apply to Scotland. I think, therefore, that we cannot, after a silence of a hundred years, during which a doubt, as to whether these statutes apply to Scotland, has been expressed by Lord Swinton, (Abridgment *voce* Gaming,) and no mention is made of them either by Baron Hume or Mr. Burnett, both of whom paid so much attention to every branch of our criminal law, find, for the first time, that an Indictment may be founded on them. And I regret this the less, because I am clearly of opinion, that the very dangerous offence here charged,—opening a common gaming-house,—is indictable at common law in this country.

LORD MEADOWBANK.—The opinion just given by the Lord Justice-Clerk, is precisely that which I had formed. I have not a doubt that the keeping a public gaming-house is an indictable offence by the common law of Scotland; and, therefore, I regret the less being compelled to hold, that an Indictment, under these statutes, cannot be sustained. I recollect the case of an act of Parliament, quite general in its phraseology,—the object of which was to declare it felony to have in one's possession the paper belonging to the Bank of England,—which act,

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from the circumstances in which it was passed, was held not to be applicable to Scotland. Now, this is just the situation in which the second act libelled on in the Indictment stands. It is an act, not to extend, but to amend, explain, and make more effectual the acts then in being, every one of which was limited to England.

LORD MACKENZIE.—I concur, though I confess that I consider the case one of very great difficulty indeed. It is admitted that the act first libelled on, the 12th Geo. II. c. 28, does not apply to Scotland; and I view that admission as of great importance, because I think the one carries the other along with it. If the rule were to be rigidly enforced, that all acts of Parliament are to be held to apply to Scotland, unless this country is specially excluded—it would often be attended with considerable difficulty. The British Parliament has, in thousands of instances, not kept in mind the existence of Scotland at all. A very large proportion of the acts in the statute-book are of this description. But then, it is often found out, from the subject and contents of the act itself, that it was meant to be applicable to the whole kingdom. And in that case, we endeavour to explicate, according to our own forms, the jurisdiction which the legislature intended to give us. But that is not the case in regard to the acts founded on in this Indictment. The second is, in substance, just an extension to a different form of the offence of the procedure and penalties prescribed by the first. Now, what were the prosecutions, to which persons offending against the 12th Geo. II. c. 28, by playing the games there prohibited, were to be subjected? Among other magistrates before whom they might be tried, the mayors of England are specified. And when it is provided in a subsequent statute, that this procedure was to be extended to a game not prohibited in the first act, it cannot surely be held, that the effect of that enactment is to extend the procedure, so as to make it competent in a wholly different Court, and in a different country. But there is another point of the case. For even if it were

held that this statute did extend to Scotland, I think it would only give jurisdiction to the inferior courts. The question whether this offence could be proceeded against at common law, is totally distinct, and one on which it is not necessary for us to enter at present.

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LORD MONCREIFF.—I agree with all your Lordships that this is a question of considerable doubt and difficulty. We are all agreed, that in the general case, an act of the Parliament of the United Kingdom is to be considered to extend to all parts of the United Kingdom. And if this be the case in regard to all statutes, it holds still more certainly true, as to those relating to matters of general policy, —still more as to those concerning public morals—and more than all, as to those regarding any thing which, by the common law of both countries, is a punishable offence. The first act to which it is necessary to look, is the second libelled on, viz. the 18th Geo. II. c. 34. The statement on which this act proceeds, is the insufficiency of "the "many good and wholesome laws now in being, for pre- "venting excessive and deceitful gaming.' Now, in Scotland we had the common law, and we had a statute, 1621 c. 14, both prohibitory of gaming. I do not know that it might not be of advantage, both in England and Scotland, that a particular game should be declared to come under the prohibition of the laws. At all events, can we suppose that the legislature, in prohibiting a "*pernicious game*," the evils of which are described in the preamble of the principal clause of this act, left Scotland out of view? Then the prohibitory clause is absolute, —that "no person or persons, of what condition soever, "shall keep any house, room, or place for playing, "or permit or suffer any person or persons whatsoever, "&c. to play at the said game of roulet, otherwise "roly-poly, &c." It is said, the particular game here prohibited was not then known in Scotland. But might not the legislature contemplate, that persons addicted to this game, when prevented from playing at it in England, would migrate into Scotland? I cannot confine broad general words, in the body of the statute, by references

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put by lawyers on the margin. We have already decided, in many cases, that references to English acts do not exclude Scotland. We have also decided that the use of English words does not exclude this country; and I think, that the reference to English Courts of law, in section 8th of this statute, cannot have any greater effect, than has been given to the use of similar terms in other cases, where it has been held that the Courts of Scotland are not excluded. If these views are correct, there remains nothing but a mere inference of some intention, on the part of the legislature, to refer to the English practice alone. I think it would be very unsafe to found on any such inference. But, I think the inference is very doubtful. It is a mistake to suppose, that the prosecutor admits the act 12th Geo. II. c. 28 not to extend to Scotland. He only thinks it unnecessary to argue the point whether it does or not. But, supposing the act 12th Geo. II. to be so constructed, as that it is held not to extend to Scotland—and, supposing that when the legislature came to draw the subsequent act, they alter its terms so as to make them appear more extensive,—I think that is an argument for supposing, that whatever may have been the intentions of the first act, the second was intended to apply to both ends of the island. The fact of the particular game not having been practised in Scotland, is probably a sufficient reason for no prosecution having hitherto taken place under this act. The circumstance is undoubtedly important, that nothing is said regarding these acts, either by Baron Hume in his elaborate work, or by Mr. Burnett in his posthumous publication, and that a doubt is expressed by Lord Swinton in his Abridgment of the Statutes, and by Mr. Hutcheson, (vol. ii. p. 354,) whether they apply to Scotland. Still I am inclined to hold that this is the case, at least with the second act libelled on; and, if it does extend to Scotland, I think indictment must lie in this Court, as we have held in all similar cases where the jurisdiction of the Justiciary Court is not excluded.

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LORD MEDWYN.—This certainly is a difficult point. I think that in all questions relating to public morals, the provisions of a British statute will apply to the whole island, unless there is something in the object and intentions of it, by which its application is limited. A special proviso on the subject is not necessary. Reference to English acts will not exclude Scotland; neither will the want of proper machinery, adapted to the legal forms of this country. As to the first act libelled on, I am clearly of opinion that it does not apply to Scotland. The preamble on which it proceeds, and the whole machinery of the act are applicable to England alone. The question then is, whether the next act, that of 18th Geo II. c. 34, is applicable to Scotland. The title is, "An Act to explain, amend, and make more effectual the Laws, in being to prevent excessive and deceitful gaming, and to restrain and prevent the excessive increase of horse races." It is said that this is general, and it is asked if there is anything here by which the act is limited to England. I answer, its object is declared to be to "amend the laws in being"—and reference is made to the particular acts which it does "amend and make more effectual," and all of which are acts applying to England alone. The civil court did indeed extend one of these to Scotland, (Elchies, Pact. Illicit.) But a civil court may apply a civil remedy, when a criminal court cannot apply a criminal remedy. The eighth section of the act gives a jurisdiction only to certain English courts. If I thought the act applied to Scotland, I should have no difficulty in finding a court in this country which had jurisdiction. But I think the mention of these English courts is just an additional proof, that it was not intended to apply to Scotland. I confess, besides, that even if I held that the statute did extend to Scotland, I should hesitate before I found that it would afford ground for an Indictment before this Court. A pecuniary penalty is not one of the ordinary pains of law, for which the public prosecutor is in the habit of insisting before us.

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LORD COCKBURN.—Although I think this a case of great difficulty, I have came to be of the same opinion as the majority of the Court. We are all agreed that a British statute will apply to Scotland, unless Scotland is excluded. The question is, whether or not there is in these acts such an exclusion. The exclusion need not be in express words—it may be evident from the phraseology and general intendment of the statute. I think that is the case here; and that opinion is strengthened by the doubt expressed by Lord Swinton, and by the length of time which has passed, without any prosecution taking place in Scotland, under these statutes.

The Court accordingly found, that the statutes referred to in the Indictment do not extend to Scotland, therefore sustained the objection to the competency of the same, and dismissed the Indictment and the pannels from the bar.[1]

June 11 1838.

Present,

THE LORD JUSTICE-CLERK.

LORDS MEADOWBANK, MACKENZIE, MONCREIFF, MEDWYN, COCKBURN.

DAVID MACKENZIE, Suspender,—*Robertson—Neaves*

AGAINST

GEORGE JEFFREY, Respondent,—*Handyside.*

SUSPENSION.—STATUTE 17 GEO. III. c. 56.—PROCESS.—1. It is no

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[1] The pannels were subsequently served with an Indictment, charging them at common law with the crime of "Opening and Keeping "a Common Gaming-House, for the playing of games of chance for "money, for the profit of the keepers, and where games of chance are "commonly and publicly played for money." After a debate on the relevancy of the charge, the Court, on the 18th of July, ordered Informations on the subject.

objection to a complaint, under the above statute, that although presented after the accession of Her present Majesty, it was addressed to *His* Majesty's Justices of the Peace, or that in the address the county was left blank.

2. The essence of the crime constituted by the statute being the *possession* of articles of the nature there referred to—not the *concealment* of them, it is sufficient if the complaint bear that such articles are concealed, *or to be found*, in the house of the person complained against.

3. The objections that a written proof was taken, and that the two Justices, before whom the accused was originally brought, did not act throughout the whole case, repelled.

No. 25. Mackenzie v. Jeffrey, June 11 1838.

ON the 13th of October 1837, the Respondent presented to the Justices of Peace for the county of Lanark, a complaint under the act 17th Geo. III. c. 56.[1] setting forth,

Suspension.

[1] By this act, entitled "An Act for amending and rendering more effectual the several laws now in being for the more effectual preventing of frauds and abuses by persons employed in the manufacture of hats, and in the woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair, and silk manufacture; and also for making provision to prevent frauds by journeymen dyers," it is provided, (§ 10), "That it shall and "may be lawful for any two Justices of the Peace of any county, ri- "ding, division, city, liberty, town or place, upon complaint made to them "upon oath, by any one credible person, or (being of the people called "Quakers) upon solemn affirmation, that there is cause to suspect that "any such purloined or embezzled materials, whether mixed or unmixed, "wrought or unwrought, are concealed in any dwelling house, out- "house, yard, garden, or other place or places, by virtue of a warrant "under their hands and seals, to cause every such dwelling house, out- "house, yard, garden, or place to be searched in the day time, and if "any such materials, suspected to be purloined or embezzled, shall be "found therein, to cause the same, and the person or persons in whose "house, outhouse, yard, garden or other place, the same shall be found, "to be brought before any two Justices of the Peace for the same coun- "ty, riding, division, city, liberty, town, or place; and if the said per- "son or persons shall not give an account, to the satisfaction of such "Justices, how he, she, or they came by the same, then the person or "persons so offending shall be deemed and adjudged guilty of a mis- "demeanour, and shall be punished in manner herein after mention- "ed, although no proof shall be given to whom such materials belong." And, by § 14, it is enacted, "That every person deemed and adjudged "guilty of a misdemeanour, in having in his or her possession, any ma- "terials suspected to be purloined or embezzled, and not producing the

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have been exhausted by the Justices before whom the suspender was originally brought.

It was answered for the Respondent:—All objections founded on mere informalities are expressly prohibited by the statute; which enacts, (§ 22.) "that no "order made touching or concerning any of the mat- "ters in this act contained, or any proceedings to be "had touching the conviction of any offender or offen- "ders against the said act of the 22d of Geo. II. or "this act, shall be quashed for want of form." 1. Independently of this enactment, the objection that the word "Lanark" was not filled up in the printed form of petition used, and that there is a mistake in the address to the Justices, are untenable, because, (1.) no formal petition is necessary under the statute, (2.) the designations of both parties being set forth in the complaint, it was evident that the application was to the Justices of the county in which they resided, (3.) the objection is too late, after the suspender has appeared, pleaded, led proof, and joined issue before the Justices of Lanarkshire, (4.) the address of the complaint being to "HIS" (instead of HER) "Majesty's Justices of the Peace" is a mere error in grammar, and quite immaterial. 2. The essence of the statutory offence is not *concealment* of embezzled goods, but the fact of goods suspected to be embezzled being *found* in the possession of the accused. 3. A proof in writing was quite competent, especially as the suspender acquiesced in it, and asked leave to give in a written pleading; and it was not necessary under the statute that the same Justices should act throughout the whole case.

The counsel on both sides having been heard, the following opinions were delivered.

LORD MEADOWBANK.—The facts of the case are very short. The statute under which these proceedings originated sets forth, that as the law then stood, there was no power to search for goods supposed to be purloined, previous to the conviction of the offender, and it provides a remedy for this evil. The crime constituted by the statute, was having in one's possession articles of the na-

ture referred to. The complainer here goes to the Magistrates, in some form or other, and states his belief that articles of this kind are concealed, or to be found, in the possession of the suspender. In the form of complaint which he prefers the county is left blank, but two Justices of the county in which the premises occupied by the suspender are situated, take the oath of the complainer,—grant a search warrant,—receive the suspender's declaration,—give both parties the benefit of a proof; and a conviction finally takes place, which is made out in the terms of the statute. This conviction has no reference—and it was not necessary that it should have—either to the original complaint, or to the oath taken to the truth of it. A variety of objections are now stated against that conviction, but they do not appear to me sufficient to lead us to suspend the judgment. (1.) The mistake and omission in the address of the complaint, I think of no consequence. The fact to what Justices it was really made, is proved by those who took it up, and by the circumstance of its being dated after the commencement of the Queen's reign, although it is addressed to "*His* Majesty's Justices of the Peace." But a verbal complaint would have been sufficient. I can only suppose, that the Justices took it down in writing, because the oath afterwards taken must refer to it. (2.) In regard to the alleged discrepancy between the terms of the complaint and the provisions of the statute, the fact of the goods being in the possession of the party complained against—not his concealment of them—is the essence of the crime. The application directed by the statute, setting forth that articles of the nature referred to are "concealed in any "dwelling-house" has reference to the fact of goods not found, but concealed—and its object is to obtain a right of search. (3.) The whole proceedings in the case cannot be quashed, because the Justices, instead of adopting a summary mode of procedure, took the proof in writing, and allowed a deliberate argument upon it. There is no provision in this act forbidding written proceedings, which there is in all those acts in which writing is intended to

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be excluded. On the contrary, there is the oath, which must be in writing, because it is only thus that it can go before the Justices who are to judge in the case, who, it is admitted, may be different from those to whom the complaint is made. Now, if part of the proceedings may be in writing—why may not all? It is not disputed that a proof is competent. And if it is so to one party, it must be to both. Then a review is given on the merits to the Quarter Sessions. Now, to enable them to exercise this power of review, the proof must be taken down in writing; and the moment you come to consider this admissible, there is an end to the objection founded on the change of the Justices during different parts of the case. The complaint is to the whole Justices of the county, and any two of them are allowed to take the whole case into consideration, if they have the means of doing so,—which any two have, if the proof is reduced to writing.

LORD MACKENZIE.—I concur in thinking that none of the objections are sufficient. (1.) The objection that the complaint was presented blank, is sufficiently answered by the fact, that it was presented to the Justices of Lanarkshire, and entertained by them, and that the party appeared without objection. (2.) Then it is said that the *concealment* of the goods is not set forth in the complaint. I am not certain that the statute required any concealment different from that possession on which rest convictions for reset of theft. It is sufficient to bring the party complained against under the requirements of the statute, if the goods are found in his possession. The provision as to goods concealed, is made with a view to the search warrant to be obtained if necessary. What is required for the conviction of the offender is possession. (3.) Then it is said that the proceedings were inaccurate, because they were reduced to writing. But the oath was not, in this respect, worse than the ordinary form of procedure in England. There the party makes an oral statement, which is afterwards taken down in writing. Now, in what respect is it ob-

jectionable, that, instead of this, a written complaint should be presented, which is afterwards sworn to as true? As to the rest of the writing, it all either took place on the motion of the suspender himself, or was acquiesced in by him. His conviction cannot be void, because he had the benefit of a written proof. It is objected, that the same Justices did not act throughout. I agree with Lord Meadowbank that this is not prohibited by the statute, and that it is quite warranted when the proof is in writing. The Justices had all before them the accused party himself, and his declaration, and they were always entitled to convict him, if he did not explain, to their satisfaction, how he came by the articles found in his possession.

LORD MONCREIFF.—I must confess that I have some doubts on two points. The mistake in the address to *His*, instead of *Her* Majesty's Justices, is not material, as the date of the instrument removes all doubt as to what was intended. I was, at first, struck with the objection, that the complaint did not set forth positively that the goods were concealed. But I am now satisfied—especially on looking at section 14—that the provisions of the act, on which this objection is founded, refer only to a preparation for a search, and do not contain the statement of the crime. But the first doubt which I have, regards the failure of the application to mention the county, to the Justices of which it is made. It may be that a verbal complaint, followed by the oath of the complainer, would have been sufficient. But there is here a formal complaint presented, and there is no oath without reference to it. That being the case, I am afraid of the precedent of finding this complaint a formal writ, on which any procedure can competently follow. A complaint of this nature ought to be addressed to a court which has jurisdiction. This might have been presented to parties who had no jurisdiction in Lanarkshire. It is not sufficient, in my view of the case, that it appears *in gremio* of the complaint, that the crime was committed, and the party re-

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sides in that county. All I say, however, is that I have great doubts on this point. I have similar doubts as to the change in the Justices, before whom different parts of the proceedings took place. It may be that the act contemplated, that nothing should be taken down in writing. I do not say that writing is, therefore, prohibited, and that it is a good objection, that the evidence, or the declaration of the accused, was reduced to writing. But the terms of the act are very precise, ordaining that "any two Justices" may, upon complaint, grant "warrant under their hands and seals," (I am quite clear that no objection lies on this point,[1]) to cause the houses of suspected persons to be searched, and such persons brought before "any two Justices;" "and if the said person or "persons shall not give an account, to the satisfaction of "*such Justices*," how he, she, or they came by the goods, their conviction shall follow. Now, I hold it to be quite clear, that in granting the search warrant, any two Justices may act, and their warrant is sufficient for bringing the goods, and the party accused, before "any two Justices;" but it is "to the satisfaction *of such Justices*,"—that is, of these last two—that the party is required to account how he came by the goods. In the present case, waving the question relative to the form in which the proof was taken, (in regard to which there seems to have been a consent by both parties,)—and, supposing it competent to allow different Justices to assist in taking the proof,—were not the two before whom the accused party

[1] It had been stated in the pleadings for the suspender, but not insisted on, that the search warrant was not under the "hands *and seals*" of the Justices, as required by the statute. The unanimous opinion of the Court seemed to be, that the want of the magistrate's seal was of no consequence in a Scotch warrant, the Lord Justice-Clerk stating that he had heard Lord Braxfield lay down the law to that effect in the case of John and Arthur O'Neal in 1796. (See Hume, Vol. I. p. 251). Lord Medwyn observed, that even in England, notwithstanding express statutory instruction, the seal of the magistrate is not now considered an indispensable solemnity.

was originally brought, those according to whose judgment he ought to have been convicted or acquitted? I have the greater difficulty on this point, because there is a great difference between hearing a proof led, or a declaration taken, and afterwards reading them.

LORD MEDWYN.—I concur with Lord Meadowbank and Lord Mackenzie. In regard to the points on which Lord Moncreiff differs—I never from the first thought, that the circumstance of the county being left blank in the complaint was fatal. Even if the 22nd section did not provide that no proceeding under this act should be "quashed for want of form," I should not think this an essential form. Lord Moncreiff does not object to the proof having been taken down in writing. We have often considerable difficulty in applying a statute of this kind, which is framed with no reference to Scotland. The proceedings under it in England would be in this form. After a written oath and declaration, there would be a verbal examination—then, if this were insufficient, a proof would follow, which would not be taken down in writing, because in England proceedings in the Justice of Peace Courts are never so taken down. Then an appeal is allowed to the Quarter Sessions, where all the witnesses may be examined over again, and others also, and the judgment of the Quarter Sessions is in fact a new judgment. When these statutes are applied to Scotland, we must not forget that it is so much the genius of our law, that every thing is to be taken down, that only the consent of the party himself can dispense with that formality. (Brown *v.* the Heritors of Kilberry, affirmed on appeal, June 12 1829. Wilson and Shaw, vol. iii. p 441.) The Justices of the Peace always take down the evidence, unless their doing so is specially prohibited, as in the Salmon Fisheries Acts, and Police Acts, where the genius of the law is made to bend to statutory provisions. Then the question remains, whether it is competent for different Justices to judge in the case, from those before whom the accused party was originally brought; and I see no

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incompetency in this. If the accused can satisfy the first Justices, he is at once dismissed. If not, a proof is taken, and then the declaration emitted by him is no more regarded, but the Justices decide on the written proof, and any two of them are as able to do this as the two before whom he was originally brought.

LORD COCKBURN.—I concur with the majority of the Court.

The LORD JUSTICE-CLERK.—I am in the same situation. The points worthy of attention are those stated by Lord Moncreiff. But the objection founded on the omission of the county in the complaint I consider too critical, especially since it was not taken *in limine*. The other point at first appeared to me doubtful; and if I thought that the act contemplated that the same two Justices should act throughout, I would consider it a serious objection. But I agree with Lord Medwyn, that when we apply to Scotland an act of this nature, the terms of which evidently refer to England alone, we must do so according to our own forms. And we never forbid writing, unless where it is specially excluded. Now, if the proof is taken down, and followed by minutes of debate—a step taken for the benefit of the accused—there can be no objection to the case being disposed of by any two of the Justices, who have an opportunity of reading the proof, and considering the arguments of the parties.

The Court accordingly refused the bill, with expenses.

JOHN CULLEN, W. S.—WOTHERSPOON & MACK, W. S.—*Agents.*

Present,

July 12
1838.

THE LORD JUSTICE-GENERAL,

LORDS MONCREIFF, MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Rutherfurd—Davidson.*

AGAINST

JAMES NOBLE—*C. G. Robertson.*

INDICTMENT.—An error in the trade of the injured party is of no consequence, if he is otherwise sufficiently and correctly described.

No. 26.
James
Noble.

Theft, &c.

JAMES NOBLE was charged with Theft, aggravated by his having been previously convicted of Theft:

IN SO FAR AS, on the 31st May 1838, within the shop situated in Dickson's close, High Street, Edinburgh, then and now or lately occupied by Mary Dick or Lyall, spirit dealer, then and now or lately residing there, the said James Noble did wickedly and feloniously steal and theftuously away take, a silver plated candlestick, the property or in the lawful possession of the said Mary Dick or Lyall.

It was elicited in the cross-examination of Mrs. Lyall, that she had had a license as a spirit dealer, extending down to October 1838,—but she had changed her residence on the 25th of May, and the license had been transferred to the new tenant. Since that time she had merely sold porter and ale.

The pooof having been concluded,

THE SOLICITOR-GENERAL, for the prosecution, in anticipation of the objection to be founded on the discrepancy between the charge, as contained in the Indictment, and the evidence, in regard to the trade of the party from whom the theft was committed, referred to the cases of William M'Gee, Glasgow, January 6, 1837, (Swinton, Vol. i. p. 425), and Edward M'Avoy, Glasgow, September 27, 1837, (Ib. p. 546.)

C. G. ROBERTSON, for the pannel, referred, in support of the objection, to Alison, Vol. ii. p. 283, and the cases

No. 26. James Noble, July 12, 1838.

Theft, &c.

of John Hannay, 1806, and John Ferguson, 1831, (Ib. pp. 285, 286.)

The LORD JUSTICE-GENERAL, before charging the Jury, requested to know the opinions of the rest of the Court on the point of law thus raised.

LORD MONCREIFF.—I am not of opinion that this is a good objection. The case of Hannay is a remarkable one, but it ought to be recollected, that it was there proved, that another person of the same name resided at the place libelled. In this case, there is no attempt to prove the existence of another Mrs. Lyall, who is a spirit dealer. There is no question that the party from whom the theft was committed, is well designed by her residence. Then she was a spirit dealer till within a few days before the crime was committed. The case, therefore, is stronger than those which Lord Meadowbank, Lord Cockburn, and I have decided at Glasgow. In regard to the case of Ferguson, I think that the distinction drawn between the names *Marion* and *Meney* was rather fine. But the discrepancy there was in the name of the party, which is a more material circumstance than his trade.

LORD MEDWYN.—I concur in thinking that the objection is a great deal too critical. No doubt, the Indictment must be so precise on a matter of this nature, as that there shall be no risk of the pannel being misled as to the person intended. Now, in this case, the woman is so nearly entitled to the designation of a spirit dealer, that she was such on the sixth day before the crime was committed—she is rightly described by her name and residence,—and she is still a dealer in articles somewhat similar to spirits. Even, therefore, if the case of M'Gee had been wrong decided, (which I am far from holding), I think this is a stronger case, and much more similar to that of M'Avoy. In the case of Ferguson, I concurred in holding, that the mother of the child was not properly designed. But the discrepancy there was, that her name was not *Marion* at all—but Elspeth *Meney*, after the sirname of her grandmother.

LORD COCKBURN.—I entirely concur in holding that the objection here taken is a great deal too fine.

The LORD JUSTICE-GENERAL.—I am of the same opinion. I do not know if I quite agree with Mr. Alison, (Vol. i. p. 283), that a greater degree of strictness is required in the designation of the injured party, than in that of a witness. A witness may be so material, that the acquittal or conviction of the pannel depends entirely on his evidence, and the party ought to be fully informed who is the person intended to be brought. In the present case, as there is no doubt that the name and residence of the party are correctly given, I think there is no ground for the objection taken.

No. 26. James Noble, July 12 1838. Theft, &c.

The Jury unanimously found the pannel guilty.

In respect of which verdict of Assize, he was sentenced to be transported beyond seas, for the period of seven years.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Rutherfurd—Handyside.*

AGAINST

JEAN GRANT, WILLIAM INNES, AND ALEXANDER GRANT.—
T. Mackenzie.

ASSIZE.—PROCESS.—A Juryman having been taken ill after the close of the evidence for the prosecution, the Jury discharged, and the pannel brought to trial the following day before a new Jury, balloted from the same list of Assize.

JEAN GRANT, WILLIAM INNES *alias* DEMPSTER, and ALEXANDER GRANT *alias* GIBSON *alias* M'DONALD, were charged with aggravated Theft and Prison-breaking. They pleaded guilty of Prison-breaking, but not guilty of Theft.

No. 27. Jean Grant and others, July 12 1838. Theft, &c.

A proof was led, at the close of which the Jury re-

No. 27. Jean Grant and others, July 12 1838. — Theft, &c.

tired for a few minutes, previous to their being addressed by the Solicitor-General for the prosecution. While they were absent, one of the Jurymen was seized with a fit, and fell, so as to hurt his mouth severely. Two medical gentlemen were immediately sent for, who, after having visited the Juryman, deponed on oath, in presence of the Court, that they had found him recovered from the fit; that he was then perfectly sensible, but that his recollection of what had passed on the trial might be confused; that he was not then in a fit state to come into Court, and attend to the addresses of counsel and the charge of the Judge; and that, although it was not impossible, that he might be able in the course of an hour, to come into Court and attend to the business, a resumption of his duties that evening might produce a recurrence of the attack, to which he appeared to be subject. They having signed a deposition to this effect, the Court, in respect of this evidence, found that the trial of the pannels could not proceed farther at present, and that the Jury now impannelled must be discharged. The Jury was accordingly discharged, and the diet against the pannels continued till the following day.[1]

July 13 On that day the diet was again called against the pannels, and a new Jury ballotted for from the same list of Assize, by whom, after a lengthened trial, they were found guilty as libelled.

In respect of which verdict of Assize, they were sentenced to be transported beyond seas—the pannel, Jean Grant, for the period of seven years; and the pannels, William Innes and Alexander Grant, for fourteen years.

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[1] The interlocutor discharging the first Jury, and continuing the diet against the pannels, is in the same terms as that which was pronounced in the case of Mary Elder or Smith, 5th February 1827, in which the competency of another trial before a new Jury, in cases where the proceedings are stopped by the illness of a Juryman, was settled, after full argument. See Syme's Reports, pp. 71-92.

Present,

July 16
1838.

LORDS MONCREIFF, MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Rutherfurd—Davidson.*

AGAINST

JOSEPH ALLISON AND MAXWELL ALLISON.—*Swinton—Ross.*

PRODUCTION.—MURDER.—1. Question, whether a plan of the *locus delicti* libelled on, can be competently proved by the evidence of the Procurator-fiscal, as a party identified with the prosecution. Opinion expressed by the Court, that the proper mode of proving such a plan is by the evidence of the surveyor by whom it is prepared.

2. Circumstances in which, on a trial of two brothers, for stabbing to the heart, with a bayonet, a person from whom they had received no injury, and against whom they could therefore bear no previous malice, one of the pannels was acquitted, and the other convicted of Murder, partly on the ground, that there was a considerable interval between the perpetration of the crime, and the provocation which was said to have led to it.

No. 28.
Joseph and Maxwell Allison.
Murder.

JOSEPH ALLISON and MAXWELL ALLISON were charged with Murder;

IN SO FAR AS, on the 27th of May 1838, at or near the house in Fisher street of Stranraer, in the county of Wigtoun, then occupied by the said Joseph Allison, the said Joseph Allison and Maxwell Allison did, both and each or one or other of them, wickedly and feloniously attack and assault John Mourne or Morrin, or M'Morrin, flesher, then residing in Castle street of Stranraer aforesaid, and did with a bayonet, or some other sharp weapon, stab the said James Mourne or Morrin, or M'Morrin, and mortally wound him in or near to the heart, in consequence whereof he almost immediately expired, and was thus murdered by the said Joseph Allison and Maxwell Allison, or one or other of them.

The pannels pleaded not guilty.

EVIDENCE FOR THE PROSECUTION.

JOHN ADAIR, writer in Stranraer, proved the pannels' declarations.

DAVIDSON, for the prosecution,—proposed to prove by

No. 28. Joseph and Maxwell Allison, July 16 1838.

Murder.

this witness the correctness of a sketch of the *locus delicti*, which was libelled on.

SWINTON, for the pannels,—objected to the competency of proving a plan of this nature, by a witness, who, as Procurator-fiscal, was identified with the prosecution; and referred to the case of James Frieland, Jedburgh, Spring 1835 (unreported), in which Lord Moncreiff permitted a plan of the *locus delicti* to be proved by the evidence of the Procurator-fiscal, solely on the ground that the counsel for the pannel, after having his attention directed to the point, did not object.

The SOLICITOR-GENERAL declined to press the point in a case of this nature; and accordingly no judgment was pronounced. But it was observed by the Court, that the correct mode of proving a plan or sketch of this nature, is by the evidence of the surveyor by whom it was made.

JAMES M'CREA, *shoemaker in Stranraer.*—I was in Stranraer about two o'clock, on the morning of Sunday the 27th of May. I was going north towards Prince's street, and saw the two pannels and John and William Allison, sons of the pannel Joseph Allison, at the door of Mrs. Hainey's house, wanting Robert Armstrong, a sailor, and other people in the house to come out and fight. Hainey is Armstrong's wife's sister. Robert Armstrong, James Torrance, and Hugh Wylie, a printer, came out; about three minutes after this, I saw Morrin falling in Fisher street. This was the first I saw of him. When the men came out, the Allisons went round to Joseph Allison's house, in Fisher street, followed by them; I went up Fisher street after them, near to Joseph Allison's house, and saw Morrin staggering and falling. I was about twenty yards from Morrin, who would be six or eight feet off the door of the house. I do not know what made him fall. I saw him stagger and fall. No person was near him when he fell. I saw the two pannels near him a moment before he fell. I could not say whether they went into the house or not. I saw neither of the pannels do any thing to the deceased. They were between him and the door. He was between me and them. Maxwell had a stick in his hand, and Joseph a grape. No other person was so near the deceased as the pannels were when he fell; I did not see either the pannels or any one else make a push at Morrin. When the deceased fell, the pannels immediately went into Joseph's house. I cannot say whether any person was nearer Morrin than myself, except the pannels. I ran forward when I

saw the deceased falling, and caught him in my arms; I think Morrin was dead before he fell; I never heard a groan. A doctor was sent for, and I saw the wound examined; it was in the left side.

Cross-examined by SWINTON *for the pannels.*—As soon as I turned into Prince's street, I heard the noise. The morning was not very clear, and there might have been other persons in the street, though I did not observe them; I had been in the house of one M'William, a shoemaker, till one o'clock in the morning, and was going home when I saw what I have stated. Morrin's back was towards me, and he was staggering backwards. He staggered back five, six, or seven feet before he fell.

ALEXANDER ADAM, *printer in Stranraer.*—I was along with the deceased on the morning of the murder, in the house of Hainey; Hugh Wylie, Robert Armstrong, and James Torrance, were also there. Some persons came and made a noise at the door, and stones were thrown at the house, which struck the roof, but did not break the skylight. Torrance, Wylie, Armstrong, and others went out. I went with them. Morrin did not go. When I got out, I saw no one except our own party. We all returned to Hainey's, and found Morrin still there. There afterwards came persons knocking at the entry door outside, and throwing stones on the roof, when the whole party went out, including Morrin, who came out last. When I got to the mouth of the close, Morrin went past me to Fisher street, where I followed half a minute after, and stopt at the corner, where I saw Morrin falling, within a few feet of the pannel's door. I was so stunned at the moment, that I cannot say I saw any one else at first; but I ran up to him, and the persons then nearest to him were James M'Crea and Wylie. I saw no one near him while he was falling. But as soon as he was down, I saw the pannel Joseph Allison at his own door. He came out of the house and ran in again. I saw the pannel Maxwell Allison also go in and out of the house twice.

Cross-examined by SWINTON *for the pannels.*—Eight or nine persons in all went out of the house. I am quite sure Armstrong did not remain in. The night was not very dark. Morrin was tipsy when he went into the house; but had fallen asleep till the noise began, and got better. I could not say there was a sober man in the whole party.

By the COURT.—I saw the pannels on the street after the murder; Joseph said he had been in bed at the time when the noise was made at his door. I contradicted him, saying it was impossible, as he could not have had time to be in the street. He had a sleeved waistcoat on, and was otherwise dressed.

JAMES CAMPBELL, *carter in Stranraer.*—I was returning home on the morning of Sunday the 27th of May. When I had got to Fisher street, near the pannel's house, daylight had broke, and the morning was clear. Morrin was coming towards me, past the pannel's door,

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Murder.

when the pannel Joseph and one of his brothers—I cannot tell whether it was Matthew or Maxwell,—came out of the house; Morrin was about four yards from the door, and M'Crea behind him. Armstrong was behind M'Crea, and two or three more behind him, whom I did not know. Morrin went forward to the door, and immediately fell backward; the other brother—not Joseph—had a grape in his hand. I saw no stroke given. Both brothers went towards Morrin before he fell. They were very near him when he fell—about a yard and a half distant; but I cannot tell exactly, as I was thirty-yards off. I saw M'Crea spring forward to catch up Morrin as he fell. No one but the pannels were near Morrin before he fell. I am sure there was nobody so near Morrin as the pannels, who were betwixt me and him.

Cross-examined by SWINTON *for the pannels.*—The party with Armstrong behind M'Crea were shouting and making a noise—jostling backwards and forwards. I did not hear them using threats towards any one. Morrin was walking very slow, without his hat, and not making any noise. His head was hanging rather down. I heard a considerable noise before I got to the corner of Fisher street. It came from the direction of the pannel's house, and was like the noise of people fighting.

By the COURT.—I went away, not thinking that Morrin was killed. I heard of his death a quarter of an hour afterwards. When the other brother had the grape, I saw no weapon in the pannel Joseph's hand.

ANN MAIN or HASWELL, *wife of John Haswell, shoemaker in Stranraer.*—My house is next to Hainey's. Between twelve and one o'clock on the night libelled, I heard a great noise of people running backwards and forwards, swearing and the like of that. The noise continued for some time, and then stopped, and began again a little before two. It was then a noise of people in the street, talking of the fight that had taken place through the night. I then saw Robert Wylie, printer, one Johnstone a shoemaker, M'Cormack a sailor, Mrs. Armstrong and others. They all went into Hainey's house. I went to bed for a quarter of an hour, when I was awakened by a great disturbance. I then recognised the pannel Joseph Allison in the crowd. I opened the door, and had a little conversation with him. I mentioned to him the previous disturbance, when he said he was sorry he had offended me or any of the neighbours. He had a stick under one arm—and there was something in his breast, fixed within his clothes. This thing was lying across his breast—he changed its position, and put it downwards. I saw nothing but a round handle of a dark colour—I cannot say whether of wood or metal, but it seemed to me to be of wood. There was a piece of string hanging either through the stick, or through that instrument.—It was hanging at the opening of his waistcoat, while his stick was under his arm. He was adjusting the instrument with his right hand. The

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Murder.

stick was a little way across his breast, and I could not positively say whether it came from the stick or the instrument, but I thought from the instrument. Charlotte M'Callum was with me,—I said to her, "God Almighty, this man has got a knife in his breast." I was at this time looking out of Peter Simpson's window in Prince's street. It is nearer Hainey's house than mine, but under the same roof. I saw something glitter, which struck me as being a knife. This was after I had been in the street. The people went backwards and forwards, a little after which the pannel Joseph Allison put his shoulder to Hainey's door—ordering the people in the house to come out and fight. He forced the door open. Robert Armstrong came out, and asked Joseph what he wanted. Joseph said he was for fighting—he cursed and swore, and so did the rest. Armstrong being alone, and they armed with sticks, Armstrong said he would fight them one by one,—but they were to use no weapons. His wife took his stick from him, but he got it back, and made a blow at a man Lawrie, and knocked him down. A little after this, a great many persons came out of Hainey's house, and ran with force round the corner towards Allison's. I then saw Morrin, he came slowly past with his hat off, and his hands in his pockets, and turned up Fisher Street. After this I heard a cry of murder, went to the window, and saw Morrin lying on the street.

CHARLOTTE M'CALLUM or CAMPBELL, *residing in Stranraer*, corroborated the last witness, especially as to having observed the pannel Joseph Allison with something in his breast, which she described as an instrument with a round handle, of more than an inch in diameter, and of the colour of common wood. She saw no part of it glitter.

JAMES M'NABNEY and JOHN BROWN, *both sheriff-officers in Stranraer*, proved that the pannel Joseph Allison was in the habit of carrying about him, when on duty as assistant Sheriff's officer, a small carabine bayonet, the handle of which was about two inches and a half long, and the blade eleven inches. The handle was japanned brown, and had a piece of cord attached to it. The pannel generally carried it in his breast pocket. His house was searched for this weapon after Morrin's death, but it was not found.

EDWARD M'MASTER, *sheriff-officer in Stranraer*, saw the bayonet in the possession of the pannel Joseph, on the 20th of May, when he asked the witness where he should hide it, in order to keep it out of the way of a man who was in his custody, and who had become delirious.

Cross-examined by SWINTON *for the pannels.*—I know Robert Armstrong. He has been in prison ever since the day of Morrin's death, and is now here. I know that he was charged with the murder.

JOHN ORGILL and ROBERT WILSON, *both Surgeons in Stranraer*, were called to inspect the body of James Morrin, and drew up the medical report libelled on. The wound which occasioned his death was of a triangular shape, and about eight inches in depth. It appeared to have

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been caused by some such instrument as a small bayonet. Both these witnesses concurred in opinion, that, from the nature of the wound, Morrin must have fallen immediately on being stabbed, that he could not have staggered back more than two or three paces, and that it was highly improbable that a party seeing him stagger at the distance of twenty yards, could have been up in time to catch him before he fell. Dr. Wilson stated in cross-examination, that he had been called to examine the pannel Maxwell Allison's head the same morning, which was considerably, though not dangerously, wounded, of which it still bore the marks.

EVIDENCE IN EXCULPATION.

MATHEW ALLISON, *labourer in Stranraer, brother of the pannels, and one of the Crown witnesses.*—I was at my brother Joseph's on the night of the 26th of May. Maxwell went home with me. I had a bottle in my pocket containing whiskey, which I had got as medicine for my wife. In passing through Prince's street, I heard something like gravel thrown on slates. I saw three or four persons whom I did not know, come running from near Hainey's house; and some others came out of Hainey's, among whom I recognised Armstrong, Wylie, and two Torrances. There might be twelve or fourteen altogether. I understood that Armstrong accused me and my brother of having thrown the gravel, which we denied. Armstrong struck Maxwell with a stick, till I saw the blood fly out of his forehead; and while I was trying to catch my brother, Wylie knocked me against the wall. I did not fall then, but some of the others knocked me down and I received many kicks. I lay senseless on the street for some time. On recovering, Wylie threatened me with violence if I mentioned any names. I promised, that if they would spare my life, none of their names would be mentioned by me. The bottle was broken, and my money, 1s. 3d., was taken. Maxwell was not there when I revived. Armstrong had no coat on. Armstrong's wife was in Prince's street, and said they had finished my brother, and they would do for me too; but Wylie said they should let me alone. I was again knocked down by some person unknown, and lay insensible for some time. I went afterwards into an entry, from which I heard Armstrong say, "Give the ——— two inches of that, and that will do for him." I heard other people speaking at the same time, and a great noise of fighting. When I came out of the close, and had got to the end of Fisher street, I heard a woman say, "there is a man dead." On advancing I saw the body of Morrin, who, I supposed, had fainted; I also saw a low set man, of the same size as Armstrong, without coat, hat, or bonnet, running westwards. Maxwell was sitting in Joseph's house, complaining of being dreadfully abused. I did not see Joseph.

WILLIAM GARRETT, *residing in Stranraer.*—I lived but-and-ben

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with the pannel, Joseph Allison. On the night of Morrin's death, I heard a noise of weapons and swearing. I heard a voice like Armstrong's swearing and calling the pannels to come out and he would give them a thrashing. A little afterwards I heard the shutter breaking. The door was shot open; the bar was not strong. One of the pannels went to the door—asked what they wanted, and said if they wanted anything let them come in and do it right. Some one called on me for God's sake to rise. I did not rise then, being in bed. I heard people passing through the house. I heard Allison's wife go to the door and cry "men, men, spare life, for life is sweet!" There was then a noise of fighting. I heard the people say in the street a man was killed; then I got up. I had previously heard one of Joseph's children come in and say, "Mother, mother, my uncle Maxwell's killed a man with a hammer, and he's lying dead on the street!"

MRS. GARRETT, *wife of the preceding witness*, corroborated her husband's evidence.—To the best of my knowledge I heard Armstrong challenge the pannels to come out. Joseph Allison said, "Go home, my good boys, and go to your bed; for I want no fighting at this time of night." The door was then forced open. Joseph's wife said at the door, "For God's sake people spare lives, for lives are sweet." A little after this, a boy came in and said, "Mother, mother, I'm glad; my uncle Maxwell has killed a man with a hammer, and he's lying dead in the street!" I got out of bed, when I heard a cry from the street, "There's a man killed—it's Morrin."

The SOLICITOR-GERERAL, for the prosecution,—gave up the case against Maxwell Allison, but argued that the evidence had clearly established the crime of murder against Joseph.

SWINTON, for the pannel Joseph Allison,—answered; (1.) Even if it had been established that the fatal blow was struck by him, the crime did not, in the circumstances of the case, amount to more than culpable homicide. His house had been assailed and broken into, and both of his brothers assaulted, and seriously wounded. And if, when he heard the party returning, he rushed out, and in the agitation of the moment, made use of that weapon which he unfortunately had about him, there was not in that act such forethought malice as is necessary to constitute murder. But, (2.) it is not proved that the wound was inflicted by him. There is no greater evidence against him than against his brother Maxwell, in regard to whom the case is now given up, although his being included in the Indictment deprived the pannel Joseph of the benefit

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of his evidence. The instrument which Mrs. Haswell saw in his possession cannot have been the bayonet, from the description which she gives of the colour of the handle. And even if it had been proved that the wound was inflicted by that bayonet, it may not have been in the hand of the pannel, but possibly in that of Armstrong, who was originally suspected of the murder, or of some one of his party, not one of whom has been examined.

LORD MONCREIFF charged the Jury.—If they believed the facts sworn to by the Crown witnesses, there could be no doubt that the crime amounted to murder; for the provocation under which it was said to have been committed, did not immediately precede the death of Morrin. On the contrary, the pannel issued deliberately from his own house, to seek the party who had previously assailed him. Nay, there seems some reason to believe, from the whole evidence, that he was the first aggressor, by his attack on Armstrong and his friends in Hainey's house. No blame is attachable to the Public Prosecutor for having included both pannels in the Indictment; because, if there had been evidence, that at the time when they went out, they went by preconcert, and that though one only had the weapon, the other knew that he had it, with the intention of using it, both would undoubtedly have been in the eyes of the law guilty of murder.

The Jury unanimously found the pannel Maxwell Allison not guilty; and, by a plurality of voices, found the pannel Joseph Allison guilty of Murder.

In respect of which verdict of Assize, the pannel Maxwell Allison was *assoilzied* simpliciter, and dismissed from the bar. The diet against the pannel Joseph Allison was adjourned till the following day (July 17), when he was sentenced to be executed at Stranraer, on the 7th of August.[1]

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[1] A statement of the whole circumstances of the case having been forwarded to the Secretary of State, accompanied by a unanimous recommendation to mercy by the Jury, the sentence was commuted into transportation for life.

Present,

July 17
1838.

LORDS MONCREIFF, MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Rutherfurd—Innes*

AGAINST

DAVID PATTERSON.—*Robertson.—Milne.*

CULPABLE HOMICIDE.—A Schoolmaster convicted of the Culpable Homicide of one of his pupils, by striking him with his fist, seizing him by the hair of the head, and throwing him with violence against a form, by which treatment his spine was fatally injured,—sentenced to eighteen months' imprisonment.

No. 29. David Patterson.

Culpable Homicide.

DAVID PATTERSON, schoolmaster of the parish of Dolphington, in the county of Lanark, was charged with Culpable Homicide;

IN SO FAR AS, on the 16th of May 1838, the said David Patterson did, within the parish school-house of Dolphington, then occupied by him, wickedly and feloniously attack and assault John Forrest, then a pupil attending his school, son of, and then residing with, James Forrest, carrier between Dolphington and Edinburgh, and residing at Stinkinstoups, in the parish of Dolphington aforesaid, and did strike him one or more blows with his fist, and did seize him by the hair of the head, and did swing him by the hair several times round his person, and did throw him violently against a form or upon the floor of said schoolhouse, whereby he received severe injuries on his spine, his head, and other parts of his body, and in consequence of which the said John Forrest, after languishing some days, died on or about the 26th of May 1838, and was thus culpably bereaved of life by the said David Paterson.

The pannel pleaded not guilty, and special defences were lodged, in which he denied the charge, and attributed the injury which the boy had sustained to an accidental fall, and subsequent exposure to cold.

It appeared from the evidence of Mrs. Forrest, the mother of the deceased, that when he came home from school, on the 16th of May, he complained of being ill, would

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Culpable Homicide.

take no dinner, was unusually dispirited and dull, and took to his bed about seven o'clock in the afternoon. He did not at first say what was the matter with him; but in the course of the night, having become considerably worse, he cried out that he had got his back broken at school; he afterwards said that Mr. Patterson had taken him by the hair of the head and swung him round, and that his back had struck a form. After this he continued daily getting worse. On Friday the 18th of May, he was visited by Dr. Kelloe of Biggar, and on Saturday by Dr. Dickson of Edinburgh, both of whom prescribed for him; but he died on the 26th of that month. During his illness, and when his mind was supposed to be wandering, he frequently called out to his mother to keep Mr. Patterson from him; and on the night before his death, when he was, according to his mother's opinion, more sensible and collected, he stated to his father in her presence, that he believed the pannel had killed him.

James Forrest, the father of the deceased, stated, that in one of the boy's calmer moments, he sent for the pannel, to hear what he would say to the charge of having used violence to him; when the pannel said, he had only taken the boy by the head, and given it a twist round. "That was on Monday," said the boy, "but on Wednesday you took me by the hair of the head, and swung me round." The pannel then said, "Whisht boy, tell no falsehoods." The boy repeated the charge; and the pannel asked him, "What state was I in—was I in a passion?" The boy answered "Yes; but you know that best yourself." Previously to the 16th the boy was in his usual health, ate his meat, and went about his play as usual; and on the 15th assisted his father to load a cart.

Three girls and two boys belonging to the school, (two of the girls and one of the boys being about twelve, and the other girl and boy about eight years of age,) were next examined. Their statements varied in some minor particulars; but they all agreed in representing the usage which Forrest received, to have been harsh and severe.

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It appeared that Forrest's class, after reading a lesson in the History of England, were called upon to spell several words. Forrest being asked to spell "stupefaction," commenced it "strip," instead of "stup;" upon which the pannel said he was a stupefaction, and seized him by the front lock of his head, and threw him down upon his back against a form. It did not appear, however, that he swung the boy round, or lifted him off his feet by the hair of the head; but some of the witnesses stated, that besides throwing him against a form, he struck him on the head, and knocked him down on the floor.

Messrs. Logan and Gray, surgeons, who had made a *post mortem* examination of the body of the deceased, deponed, that in their opinion, his death was caused by an injury in the spine, and that that injury might have been produced by the treatment which they had heard the witnesses describe, as having been received by Forrest on the 16th of May. On cross-examination, they admitted that the injury might also have been produced by a fall from a tree. Exposure to cold alone might have produced a general inflammation of the spine, but not the particular inflammation, the appearances of which they observed in the body.

Dr. Kelloe, surgeon in Biggar, corroborated these witnesses. If the injury which caused the death had been inflicted so lately as the 16th, he would have expected some discoloration, which did not exist. He considered it impossible, however, that if such an injury had been inflicted earlier, the boy could have pursued his usual amusements, or been able to do anything like assisting in loading a cart without complaining.

Thomas Smith, a boy about seven years of age, was examined in exculpation, and stated that a few days before Forrest was taken ill, he went with him to a wood in the neighbourhood to look for beech-nuts, and that Forrest had then fallen from the branch of a tree, and that he had left him lying on the ground for some time. On cross-examination, this witness stated that the height

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Culpable Homicide.

from which Forrest fell, was eight feet nine inches, but he could give no reason for fixing upon that particular height, as he had never seen the tree measured, and no one had told him the height.

The Rev. Dr. Aiton of Dolphington, and the Rev. John Wilson of Walston, gave evidence as to the general good character and mild disposition of the pannel.

Drs. Dickson and Burt were examined as to the probable cause of the injuries which caused the boy's death, but their evidence did not contradict that given by the medical witnesses for the prosecution.

The SOLICITOR-GENERAL, for the prosecution, and ROBERTSON for the pannel, having addressed the Jury, Lord Moncreiff summed up the evidence.

The Jury, by a large majority, found the pannel guilty as libelled, but, in respect of his previous good character, recommended him to the leniency of the Court.

In respect of which verdict of Assize, he was sentenced to be imprisoned in the Jail of Edinburgh, for the period of eighteen calendar months;—the Court observing, that it was solely in consequence of the recommendation of the Jury, that they felt themselves relieved from the necessity of pronouncing against him a sentence of transportation.

July 18 1838.

Present,

LORDS MACKENZIE, MONCREIFF, MEDWYN.

HER MAJESTY'S ADVOCATE, Petitioner—*Innes.*

AGAINST

JAMES LAIRD, Respondent.—*H. G. Bell.*

CITATION.—CAUTIONER.—Application having been made to the Court by petition, in name of the Lord Advocate, for forfeiture of the bail bond lodged for the appearance of a party, against whom sentence of fugitation had been passed at a former diet of Court—the Cautioner allowed a proof, that the party was not legally summoned.

No. 30. The Lord Advocate v. James Laird, July 18 1833.

Petition.

ON the 19th of February 1838, sentence of fugitation was pronounced against JOHN LAIRD, who failed to appear, on a charge of Breach of Trust and Embezzlement.[1]

A petition was now presented to the Court, stating that on the 17th of November 1837, a bail bond had been granted by James Laird, residing in Bernard street, Leith, whereby he bound himself, under a penalty of fifty pounds, "to present the person of the said John Laird, "at any time and place, to which he should be lawfully "summoned, within the space of six calendar months" from the date thereof, and at all subsequent diets of Court, to underlye the law in any criminal prosecution which might be brought against him, for the said crime. The principal bail bond, and an extract of the sentence of outlawry against John Laird, were produced with the petition, which prayed the Court to ordain the Cautioner to give in answers, and thereafter, on advising the same, to declare the bail-bond forfeited.

Answers were lodged for the Cautioner, stating that when the diet was called against John Laird, on the 19th of February last, proof was adduced, that he had left Leith on the 11th December 1837, and had not returned or been heard of since; that the Indictment was not executed against him personally, but by leaving the service copy at his mother's house, in Leith, on the 3d of February 1838; that the presumption was thus raised, that he was furth of the kingdom, and that therefore the only legal citation would have been, by open proclamation at the market-cross of Edinburgh, and pier and shore of Leith, upon the long *inducia* of sixty days, (Alison, Vol. i. p. 336, case of Robert Cresswell, February 10th 1766. Hume, 2. p. 259. Act of Sederunt, 14th December 1805, § 1,) and that the sentence of fugitation proceeded on the assumption that he was furth of the kingdom, and therefore, that no appearance could be made for him without a mandate. It was argued, that in these circumstances, since John Laird was not "lawfully summoned," no for-

[1] *Ante*, p. 26.

No. 30. The Lord Advocate v. James Laird, July 18 1838.

Petition.

feiture of the bail-bond could have been declared, even within the six months from its date, and much less was it competent after the expiry of that period.

The Court allowed the Respondent to prove that the pannel John Laird, was not legally summoned to appear on the 19th of February last, and allowed the Prosecutor a proof of all facts and circumstances to show that he was.[1]

HER MAJESTY'S ADVOCATE—*Innes*—*Davidson*.

AGAINST

FRANCIS GAIRDNER AND WILLIAM ROBERTSON—*Inglis*.
AND BARBARA JAMIESON—*J. T. Gordon*.

DEFENCE OF ALIBI.—It is not sufficient that a special defence, lodged as a foundation for a plea of *alibi*, state that the pannel was not, during a particular part of the day libelled, at or near the place libelled as the *locus delicti*, unless it states or refers to the places where he alleges that he actually was.

No. 31. Francis Gairdner, William Robertson, and Barbara Jamieson, July 18 1838.

Theft, &c. and Reset.

FRANCIS GAIRDNER and WILLIAM ROBERTSON were charged with Theft, aggravated by their being habite and repute thieves; and BARBARA JAMIESON or DONNELL or O'DONNELL, was charged with Reset of Theft. They pleaded not guilty; and special defences were lodged for the pannels Gairdner and Robertson, setting forth that on the night libelled, and especially between the hours of eight or nine, they were not at or near the place libelled as the *locus delicti*.

The COURT, on the motion of the Advocate-depute, found, that a more minute specification was necessary, in order to prepare the Public-prosecutor to meet a defence of *alibi*.

INGLIS, for the pannels, added to their defences a statement, that from eight to nine o'clock on the night libelled,

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[1] No further proceedings took place in this Case.

they were at the places mentioned in their declarations respectively.

No. 31. Francis Gairdner, William Robertson, and Barbara Jamieson, July 18 1838. Theft, &c. and Reset.

A proof having been led, the Jury found the pannels guilty as libelled.

In respect of which verdict of Assize, the pannels Francis Gairdner and William Robertson were sentenced to be transported beyond seas, for the period of seven years; and the pannel Barbara Jamieson to be imprisoned in the Bridewell of Edinburgh, for the period of six calendar months.

NORTH CIRCUIT.

Autumn 1838.

INVERNESS.

Sept. 24 1838.

Judges—LORDS MACKENZIE AND MEDWYN.

HER MAJESTY'S ADVOCATE—*Handyside.*

AGAINST

DUNCAN HUNTER—*E. S. Gordon.*

WITNESS—OUTLAW.—An outlaw is inadmissible as a witness, and the Court will not, without a previous application, repone him against the sentence of outlawry, in order to make his evidence competent.

No. 32. Duncan Hunter. Assault.

DUNCAN HUNTER was charged with aggravated Assault. He pleaded not guilty.

Robert Hunter, the pannel's brother, and the party alleged to have been assaulted, having been called as a witness—

E. S. GORDON, for the pannel,—objected to his admissibility, that he was an outlaw, and a person in that situation "cannot bear testimony on any occasion." (Hume, Vol. ii. p. 270; Alison, ii. p. 350.) In proof of this objection, an extract of a sentence of outlawry, pronounced

No. 32. Duncan Hunter, Inverness, Sept. 24 1838.

Assault.

against the witness at the Glasgow Circuit several years ago, was produced.

The ADVOCATE-DEPUTE, for the prosecution, answered,—There is no authority for this objection, except an *obiter dictum* of Baron Hume, not given when he is treating of objections to witnesses, but inserted incidentally as one of the alleged consequences of outlawry. The disabilities under which an outlaw labours refer entirely to his inability " to claim any personal privilege or benefit whatso- " ever of the law," (Hume, Vol. ii. p. 270,) and cannot affect the right of the Public-prosecutor. The obligation to bear testimony in a court of law is very properly compulsory on every one; and it is not only illegal, but unjust, to extend the objections against witnesses beyond those daily recognised. At all events, as outlawry is a sentence of this Court, the same Court has power to remove the sentence.

LORD MEDWYN.—I have really no difficulty in this case. In regard to the last proposal of the Public-prosecutor, I have no doubt that this Court has power to remove the sentence of outlawry; but I do not think that we should exercise that power in this case, as there has been no previous application made for a recall of the sentence. Upon the general question, I have no hesitation in following the authority of Baron Hume. No doubt this is a public prosecution, and outlawry is not now attended with the same consequences as before the Act 1612. Still an outlaw has no *persona standi*, and the pannel is entitled to raise the objection.

LORD MACKENZIE.—That an outlaw cannot be a witness is distinctly stated by Baron Hume. There has been no contradiction of this authority, nor any contrary practice alleged or proved. My understanding always was, that this was the law of Scotland, and I am of that opinion now. A criminal outlaw has always appeared to me to be in a more unfavourable situation, than a convict who has already suffered punishment, in as much as he is at the mercy of the Prosecutor. I am not so clear as to the

proposal of removing the sentence; but I concur in thinking that we must refuse it in this case, as there has been no previous application for its recal.

No. 32. Duncan Hunter, Inverness, Sept. 24 1838. Assault.

The Court accordingly allowed William Jeffrey, junior, writer in Glasgow, to be examined, and he having proved that the extract of the sentence of outlawry produced applied to the witness, sustained the objection to his admissibility.

The Advocate-Depute then gave up the case, and the Jury, under the direction of the Court, found the pannel not guilty.

In respect of which verdict of Assize, he was assoilzied *simpliciter*, and dismissed from the bar.

HER MAJESTY'S ADVOCATE.—*Handyside.*

AGAINST

HECTOR M'LEAN.—*C. G. Robertson.*

WITNESS.—AGENT AND CLIENT.—In a charge of forging the signatures to a Bond of Caution, it is no objection to the admissibility of a witness, that he was the professional agent employed by the pannel in procuring the bond.

No. 33. Hector M'Lean, Inverness. Sept. '24 1838. Forgery, &c.

HECTOR M'LEAN was charged with Forgery; as also the wickedly and feloniously using and uttering as genuine a forged bond or obligatory writing, knowing the same to be forged;

IN SO FAR AS, upon the 23d of May 1838, and within his dwelling-house situated at Eyre, or at some other place within the county of Inverness, to the Prosecutor unknown, the said Hector M'Lean did wickedly and feloniously forge and adhibit, or cause and procure to be forged and adhibited, to a bond of caution, commonly called a bond for violent profits, bearing to be granted by him the said Hector M'Lean, as principal, and Alexander Campbell, shepherd, residing at Kingsburgh, and Angus Matheson, tenant in Glenhinistle, as cautioners with, and for him

No. 33. Hector M'Lean, Inverness, Sept. 24 1838.

Forgery, &c.

and to be dated at Duntulm, the 23d day of May 1838, the signature and designation 'Angus Matson, Glnhisdale,' and the signature 'Alexr Cammpell,' intending the same to be in imitation of, and to pass for, and to be received as, the genuine subscriptions respectively of Alexander Campbell, shepherd, residing at Kingsburgh, and Angus Matheson, tenant in Glenhinisdale or Glenhinistle, in the parish of Snizort; FARTHER, on the 24th of May 1838, and within the office, at Portree, of Donald Mackenzie, writer there, the said Hector M'Lean did wickedly and feloniously use and utter as genuine, the said bond, having the said forged subscriptions adhibited thereto, he well knowing the same to be forged, by then and there delivering the same as genuine to the said Donald Mackenzie, in order that the same may be lodged by him, as his agent, in the hands of Lewis Jameson, Sheriff-clerk-depute at Portree aforesaid, in order to be produced in a process of removing brought against him, the said Hector M'Lean, and then depending in the Shèriff-court of Inverness-shire, at the instance of John M'Leod, Esquire, of Rasay, William Mackenzie, Esquire, writer to the signet, residing in Edinburgh, his trustee, and Donald MacRae, Esquire, residing at Achtertyre, their factor, and in which decreet of removing had been pronounced against the said Hector M'Lean; and the said Donald Mackenzie, acting under his instructions, date last mentioned, and within the Sheriff-clerk's office at Portree, did, accordingly, lodge the said bond in the bands of the said Lewis Jamieson in order to be so produced; and the said bond being so lodged along with defences in name of the said Hector M'Lean to the said process, and a petition, also in his name, for opening up the said decreet of removing already pronounced, both prepared under his instructions by the said Donald Mackenzie, his agent, the said decreet, in respect of the said bond, was recalled by the Sheriff-substitute of the Skye District of Inverness-shire:

The pannel pleaded not guilty.

Donald Mackenzie writer in Portree, having been called as a witness—

C. G. ROBERTSON, for the pannel, objected to his admissibility—that he was the private agent employed by the pannel in obtaining the bond of caution, the signatures to which are alleged to have been forged; and it is laid down by Mr. Alison (Vol. ii. p. 468,) that "the agent or counsel employed by the prisoner in conducting his defence, or *in the matter which has given rise to the trial, though previous to the crime*, are not at liberty to divulge any facts which have come to their knowledge in that capacity, or after that employment began."

The objection was repelled, and the proof established, that the pannel had applied to Mr. Mackenzie to act as his agent in procuring the bond of caution, and was taken by him to the Sheriff-clerk depute, by whom the bond was prepared, and to whom it was afterwards returned by the pannel with the forged signatures, which were proved to have been adhibited, not by him, but by others at his instigation.

No. 33. Hector M'Lean, Inverness, Sept. 24 1838.

Forgery, &c.

The Jury found the pannel guilty of uttering the bond mentioned in the libel, knowing the same to be forged.

In respect of which verdict of Assize, he was sentenced to be imprisoned in the Jail of Inverness, for the period of two years.

HER MAJESTY'S ADVOCATE—*Handyside.*

Sept. 25 1838.

AGAINST

ALEXANDER M'LEAN and MALCOLM M'GILLIVRAY.—*E. S. Gordon.*

DEFORCEMENT.—SHERIFF.—WARRANT OF OPEN DOORS.—CONTEMPT OF COURT.—1. Two pannels having been charged with Deforcement, by obstructing the execution of a warrant of open doors, granted by a Sheriff, for the purpose of removing goods poinded under a Small Debt decree,—the relevancy of the Indictment objected to, on the ground that a Sheriff has no power to grant such a warrant, and the case certified to the High Court.

2. A pannel sentenced to eight days imprisonment for contempt of Court, by his conduct at the bar.

ALEXANDER M'LEAN and MALCOLM M'GILLIVRAY were charged with the crime of wickedly and feloniously Obstructing and Deforcing an officer of the law, while engaged in the execution of his duty;

No. 34. Alexander M'Lean and Malcolm Macgillivray, Inverness.

Deforcement.

IN SO FAR AS, a poinding having been duly executed on or about the 15th day of May 1838, of certain goods and effects belonging to, or in the lawful possession of the said Alexander M'Lean, lying in his house or dwelling-place at Kyleakin, in virtue of a Small Debt decree pronounced by the Sheriff of Inverness-shire, dated the 20th day of March 1838, and charge thereon, dated 2d day of April following, for payment by the said Alexander M'Lean, of the sum of six pounds one shilling and fourpence sterling, with nine shillings and sevenpence of expenses

No. 34. Alexander M'Lean and Malcolm Macgillivray, Inverness, Sept. 25 1838.

Deforcement.

decerned and ordained to be paid by the said Alexander M'Lean to William Watson, junior, and Company, rope manufacturers, Campbelton, and Donald Mackenzie, writer in Portree, their mandatory,—and a warrant having been granted under the hand of George Robertson, Esquire, Sheriff-substitute of the Isle of Skye district of Inverness-shire, dated at Portree, 12th June 1838, proceeding on the said Small Debt decree, and upon an execution of the said poinding under the hands of Donald Robertson, one of the Sheriff-officers of Inverness-shire, and upon a minute presented by the said Donald Mackenzie, praying for warrant of open doors, whereby the said Sheriff-substitute granted warrant to officers of court, with proper assistants, to break open the door or doors of the dwelling house of the said Alexander M'Lean, to the effect and for the purpose of removing the said poinded goods and effects, and to use her Majesty's keys thereto in common form; and the said Donald Robertson having been employed to execute the said warrant granted by the said George Robertson; and having, on the 23d day of June 1838, proceeded for that purpose along with John Nicolson, joiner and cartwright, and John Campbell, residing in Breakish, as his concurrents or assistants, to the house or dwelling-place of the said Alexander M'Lean at Kyleakin aforesaid; and the said Donald Robertson, and his said assistants, having found the door of the said dwelling-place locked, and having demanded and been refused admittance by the said Alexander M'Lean, and having intimated and read to the said Alexander M'Lean, and also to the said Malcolm M'Gillivray, being then present, and in company with the said Alexander M'Lean, the said warrant to break open the door of the said dwelling-house, to the effect and for the purpose of removing the poinded effects therein; and the said Donald Robertson having intimated to them that he was a Sheriff-officer, and that, in the discharge of his duty, he required to put the said warrant in execution, the said Alexander M'Lean and Malcolm M'Gillivray, on the said 23d of June 1838, and at or near to the door and stair of the said house or dwelling-place at Kyleakin, did, both and each, or one or other of them, in company and concert with other persons to the Prosecutor unknown, wickedly and feloniously attack and assault the said Donald Robertson, and did seize hold of him, and did prevent him from reaching the said door so as he might be able to execute the said warrant, and did, by intimidation, and by threats of personal violence, and by overpowering force, prevent the said Donald Robertson from obtaining access to the said house, although he made several attempts to reach the said door, for the purpose of carrying the said warrant into execution; and this they did, well knowing the said Donald Robertson to be a Sheriff-officer, then acting in execution of his duty as such; and the said Donald Robertson was thus prevented from carrying the said warrant into execution, and was deforced and obstructed in the execution of his duty, by the said Alexander M'Lean and Malcolm Macgillivray, or one or other of them.

E. S. GORDON, for the pannels,—objected, that the statement of facts in the minor proposition was not relevant to sustain the charge of "obstructing and deforcing "an officer of the law, while engaged in the execution of "his duty;" that, on the contrary, that statement established that the alleged officer of the law, said to have been deforced, was, at the time libelled, attempting to execute an illegal warrant,—no Sheriff having power in civil causes, and more especially while acting under the authority of the Small Debt Act, and in the manner set forth in the Indictment, to grant warrant for breaking open the doors of a dwelling-house.

No. 34. Alexander M'Lean and Malcolm Macgillivray, Inverness, Sept. 25 1838.

Deforcement.

Lords MACKENZIE and MEDWYN certified the case to the High Court of Justiciary.[1] And in respect that the pannel Alexander M'Lean had been guilty of a contempt of Court, by coming to the bar in a state of intoxication, and by behaving while in Court in a most improper and unbecoming manner, their Lordships ordained him to be imprisoned in the Tolbooth of Inverness, and kept from the use of all intoxicating liquors, for the period of eight days, and thereafter to be set at liberty.[2]

PERTH.

Judges—LORDS MACKENZIE AND MEDWYN.

October 3 1838.

HER MAJESTY'S ADVOCATE—*Handyside.*

AGAINST

JANE PYE—*Wardlaw.*

THEFT.—FINDING LOST PROPERTY.—EXCULPATORY EVIDENCE.—1. A pannel convicted of theft, by appropriating to her own use money which had dropped from the pocket of a person in her company, well knowing to whom it belonged.

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[1] No farther proceedings took place against the pannels.

[2] The pannels had been admitted to bail.

2. Evidence by the pannel's mother of the account which her daughter had given her, *de recenti*, of her having found the money, allowed to be given in exculpation.

No. 35. Jane Pye, Perth, October 3 1838.

Theft.

JANE PYE was charged with Theft;

IN SO FAR AS, on the 24th of July 1838, the said Jane Pye did, in or near to a stair situated in High street of Dunfermline, and which stair leads to the house occupied by William Pye, tailor, wickedly and feloniously steal, and theftuously away take, from the pocket or person of William Rolland, Esq. of North Burnside, in the parish of Saline and county of Fife, five bank or bankers' notes for L.20 Sterling each, the property or in the lawful possession of the said William Rolland: Or OTHERWISE, the said money having, time and place foresaid, dropt or fallen from the pocket or person of the said William Rolland, unperceived by him, he being then in the company of the said Jane Pye,—she, the said Jane Pye, did immediately, or soon thereafter, wickedly and feloniously steal and theftuously take and carry away the said money, and did appropriate the same, or part thereof, to her own uses and purposes, she well knowing the said notes to be the property, or in the lawful possession of the said William Rolland.

The pannel pleaded not guilty, and a proof was led.

Mr. Rolland proved the loss of notes of the same bank, and to the same amount, as those libelled on. He was proved to have been seen in the pannel's company, although from having been in a state of intoxication, he could not identify her. The notes were found in the pannel's possession; and she admitted in her declaration having found them at the place where she and Rolland had been seen together, but denied all knowledge to whom they belonged. To corroborate this last statement, the evidence of the pannel's mother was admitted in exculpation; and was to the effect, that on the night libelled, the pannel had communicated to her the fact of her having found the money.

The Jury found the second alternative charge in the libel proven, and the first charge not proven.

In respect of which verdict of Assize, the pannel was sentenced to be imprisoned, in the Tolbooth of Dunfermline, for the period of twelve calendar months.

HER MAJESTY'S ADVOCATE—*Handyside.*

October 4
1838.

AGAINST

WILLIAM CATTANACH—*Henderson.*

INDICTMENT.—OBJECTION OF TOO GREAT LATITUDE IN STATING THE TIME OF THE OFFENCE.—A latitude of more than seven months allowed to be taken, in stating the time during which various acts of theft were committed, in respect the crime was charged to have been done with the co-operation of, and in concert with the son of the party from whom the goods were stolen.

WILLIAM CATTANACH was charged alternatively with Theft or Reset of Theft;

No. 36. William Cattanach, Perth.

Theft or Reset.

IN SO FAR AS, at different times between the term of Whitsunday 1837 and the month of January 1838, the particular dates being to the Prosecutor unknown, the said William Cattanach, with the co-operation and assistance of, and in company, concert, and agreement with George Bain, junior, a boy of twelve years of age or thereby, son of, and then residing with, George Bain, senior, watchmaker in Brechin, wickedly and feloniously steal, and theftuously away take from the shop in Brechin, occupied by the said George Bain, a silver lever watch, maker's name, George Bain, Brechin, No. 2722; a silver watch, maker's name, "Thos. Maston, "London, No. 22076;" a silver seconds watch, maker's name and number unknown;—as also, a silver watch guard, three gold breast pins, a razor, a pair of scissors, a steel watch chain, a brass key, a chamois leather bag, all the property or in the lawful possession of the said George Bain, senior: OR OTHERWISE, the foresaid articles having been, time and place above libelled, stolen by the said George Bain, junior, the said William Cattanach did, time above libelled, and within the lodging then occupied by him in Brechin, in the house of Elizabeth Tosh or Cairns, widow, or within the shop in Brechin of William Fairweather, &c., or in a close or passage leading to the dwelling-house of the said George Bain, senior, or elsewhere in the town of Brechin, to the Prosecutor unknown, wickedly and feloniously reset and receive the foresaid articles, or part thereof, he well knowing the same to have been stolen.

HENDERSON, for the pannel, objected to the relevancy of the Indictment, that too great latitude was assumed in stating when the crime was committed.

No. 36. William Cattanach, Perth, October 4 1838.

Theft or Reset.

The ADVOCATE-DEPUTE, for the prosecution, answered,—The latitude assumed is supported by the narrative, of the thefts having been committed in concert with the son of the party from whom the articles were stolen, which brings the case within the category of thefts by servants, or other inmates.

The objection was repelled.

The pannel pleaded not guilty, a proof was led, and the Jury found him guilty of reset of theft.

In respect of which verdict of Assize, he was sentenced to be imprisoned in the Jail of Forfar, for the period of eighteen calendar months.

HER MAJESTY'S ADVOCATE—*Handyside.*

AGAINST

DONALD M'LEOD and WEDDERBURN DICK or SMITH.—*C. Robertson.*

THEFT.—HUSBAND AND WIFE.—Two pannels charged with Theft, in respect of their having, in concert together, carried off goods described as the property of the husband of one of them,—an objection taken to the relevancy of the charge,—and the case certified to the High Court.

No. 37. Donald M'Leod and Wedderburn Dick or Smith, Perth, October 4 1838.

Theft.

DONALD M'LEOD, labourer, lately residing with John Smith flax-dresser at Bridgend of Ruthven, and WEDDERBURN DICK or SMITH, wife of, and lately residing with the said John Smith, both prisoners in the jail of Forfar, were charged with Theft; in so far as, (1.) upon the 14th of July 1838, within the house situated at Bridgend of Ruthven aforesaid, occupied by the said John Smith, the said Donald M'Leod and Wedderburn Dick or Smith did, both and each, or one or other of them, wickedly and feloniously steal, and theftuously away take, a razor, a paper-case, and a merino stock, the property or in the lawful possession of James Robertson, labourer, residing or lodging with the said John Smith: likeas, (2.) time and place above libelled, the said Donald M'Leod having concerted with the said Wedderburn Dick or

No. 37. Donald M'Leod, and Wedderburn Dick or Smith, Perth, October 4 1838

Theft.

Smith, wife of the said John Smith, that she should abscond in his company from the house of the said John Smith, her husband, and that they should cohabit together, the said Donald M'Leod, with the connivance or assistance of the said Wedderburn Dick or Smith, or in conjunction or company with her, did, time and place above libelled, wickedly and feloniously take from the house of the said John Smith, and did steal, and theftuously carry away, (various articles specified,) the property or in the lawful possession of the said John Smith.

C. ROBERTSON, for the pannels, objected to the relevancy of the second charge, on the ground that neither of the pannels could be held guilty of Theft, for having, in concert together, carried off goods which were the joint property of the female pannel and her husband.

LORD MACKENZIE and MEDWYN, both stated, that they had formed a decided opinion on the subject, but since the point was new, they would certify the case to the High Court of Justiciary.[1]

HER MAJESTY'S ADVOCATE—*Handyside.*

October 5 1838.

AGAINST

PETER RICE.—*Wardlaw.*

INDICTMENT.—LOCUS DELICTI.—A charge of Assault and Robbery, stated to have been committed "in or near to" a certain street, abandoned by the Public-prosecutor, with the concurrence of the Court, on the ground that the crime was proved to have been committed at a spot three hundred yards distant from the street libelled, and in a street which, though in continuation of it, was known by a different name.

No. 38. Peter Rice.

PETER RICE was charged with Assault and Rob-

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[1] No further proceedings took place against the pannels, the circumstances of the case not being considered such, as to render it necessary that the prosecution should be insisted in.

No. 38. Peter Rice, Perth, October 5 1838.

Assault and Robbery.

bery, which were stated to have been committed "in or "near to Queen Ann street of Dunfermline."

He pleaded not guilty, and a proof was led, from which it appeared that the assault took place at a spot about three hundred yards to the east of Queen Ann street, and in a street which had formerly been a bye road, but had recently acquired the name of James' Place. This new street was a continuation of Queen Ann street, or at least in a straight line with it, but had never been considered part of that street.

The Court held, that the distance of the *locus delicti* from Queen Ann street, was such, that it could not be held to be comprehended within the words of the Indictment.

The ADVOCATE-DEPUTE accordingly gave up the case, and the Jury found the libel not proven.

In respect of which verdict of Assize, the pannel was assoilzied *simpliciter*, and dismissed from the bar.

SOUTH CIRCUIT.

Autumn, 1838.

Sept. 11 1838.

JEDBURGH.

Judge,—LORD MONCREIFF.

HER MAJESTY'S ADVOCATE—*Davidson*.

AGAINST

JAMES PRINGLE—*Milne*—AND HELEN SCOTT—*Rhind*.

PRODUCTION—AGGRAVATION OF HABITE AND REPUTE.—1. Question whether part of the stolen articles libelled on as productions, but never lodged in the clerk's hands, can nevertheless be produced, in respect no enquiry had been made for them on the part of the pannels, before the trial.

2. The aggravation of being habite and repute a thief, found proven against a pannel, who had been twice convicted during the three preceding years, although the evidence of one out of the two witnesses to the aggravation, extended no farther back than two years, during fifteen months of which the pannel had been in jail under the last conviction.

No. 39. James Pringle and Helen Scott, Jedburgh, Sept. 11 1838.

JAMES PRINGLE and HELEN SCOTT were charged with Theft, aggravated by their being habite and repute Thieves, and having been previously convicted of Theft.

They pleaded not guilty.

Theft, &c.

1. Among the stolen articles which were libelled on as productions, were "L.16, or thereby, in bank or bankers' notes for one pound each." In the course of the proof, the notes alleged to have been stolen were produced by a witness, who was clerk in a bank at Newcastle, where they had been changed for gold, and who had had them in his possession ever since.

MILNE, for the pannels, objected to their production, on the ground of their not having been lodged in the clerk's hands.

It was admitted that no inquiry had been made on the part of the pannels for the notes.

LORD MONCREIFF, pronounced no decision on the point thus raised, but thought the practice loose, and the production of the notes was not pressed.

2. Two previous convictions were proved against the pannel Pringle, dated respectively, 13th August 1835, and 22nd August 1836. A witness deponed that he had been habite and repute a common thief for two years; but during fifteen months of that time he had been in jail under the last conviction. Another witness gave him the same character for a much longer period.

The ADVOCATE-DEPUTE, for the prosecution, referred to the case of Wilson and Maddan, Dumfries, April 23, 1838, (Swinton, Vol. ii. p. 107,) where the period of the pannel's imprisonment, on the charge for which he was

No. 39. James Pringle and Helen Scott, Jedburgh, Sept. 11 1838

Theft, &c.

under trial, was allowed to be reckoned in the time during which the character of habite and repute attached to him; and argued, that imprisonment under conviction was a much stronger case.

MILNE, for the pannel Pringle, answered,—The evidence of two witnesses is necessary to prove the aggravation; and if the period of imprisonment is deducted, one of the witnesses speaks to thirteen months only, which is not sufficient to fix the character of habite and repute. (Jean Dickson or Benton, High Court, July 11, 1836. Swinton, Vol. i. p. 245.)

LORD MONCREIFF expressed an opinion that the aggravation was sufficiently proved.

The Jury found both pannels guilty as libelled.

In respect of which verdict of Assize, they were sentenced to be transported beyond seas, for the period of seven years.

WEST CIRCUIT.

Autumn, 1838.

GLASGOW.

Sept. 20 1838.

Judges—LORDS MEADOWBANK AND COCKBURN.

HER MAJESTY'S ADVOCATE—*Innes.*

AGAINST

ELIZABETH CONNER and SUSAN DOUGHARTY—*Broun.*

AGGRAVATION.—EVIDENCE.—A substantive aggravation, such as housebreaking, is not sufficiently proved by the unsupported evidence of one witness.

ELIZABETH CONNER and SUSAN DOUGHARTY were charged with Theft, aggravated by having been committed by means of House-breaking, and by persons who were habite and repute thieves, and had been previously convicted of theft.

No. 40. Elizabeth Conner, and Susan Dougharty, Glasgow, Sept. 20 1838.

Theft, &c.

They pleaded not guilty, and a proof was led, which was quite conclusive as to the principal crime charged, and the aggravation of previous conviction.

BROUN, for the pannels, argued, that one witness only had spoken to the fact of the premises having been locked, and that his evidence, being wholly uncorroborated, was not sufficient to prove a substantive aggravation, such as that of house-breaking. (Case of John Davidson, Perth, April 24, 1838, Swinton, Vol. ii. p. 102.)

LORD COCKBURN charged the Jury, directing them, that it was a question for their consideration, whether or not the witness who spoke to the house-breaking was corroborated, but if they were of opinion that he was not, they could not find that aggravation proved.

The Jury found the pannels guilty as libelled, but without the aggravation of house-breaking.

In respect of which verdict of Assize, the pannel Conner was sentenced to be transported beyond seas, for the period of seven years; and the pannel Dougharty, to be imprisoned in the Bridewell of Glasgow, for twelve calendar months.

HIGH COURT.

Nov. 7
1838.

Present,

THE LORD JUSTICE-CLERK,

LORDS MACKENZIE, MEDWYN.

HER MAJESTY'S ADVOCATE—*Lord Advocate Murray—Innes.*

AGAINST

JACOB CAMPBELL—*B. R. Bell.*

WITNESS.—PARENT AND CHILD.—A Boy between ten and eleven years of age, found inadmissible as a witness against his father, even in a trial for an injury inflicted on his mother.

No. 41.
Jacob Campbell.

Assault, &c.

JACOB CAMPBELL was charged with Assault, especially when committed to the injury of the person, and more especially still, when committed by a man upon his own wife, and by a person who has been previously convicted of assaulting his own wife.

He pleaded not guilty, and a proof was led, in the course of which Robert Campbell, the pannel's son, a boy between ten and eleven years of age, was tendered as a witness for the prosecution, but found inadmissible.

The Jury found the pannel guilty.

In respect of which verdict of Assize, he was sentenced to be transported beyond seas, for the period of seven years.

Present,

THE LORD JUSTICE-CLERK.

LORDS MONCREIFF, COCKBURN.

Nov. 10
1838.

HER MAJESTY'S ADVOCATE—*Lord Advocate Murray—Innes.*

AGAINST

WILLIAM BYRNE—*Moncreiff—Ross.*

ASSAULT WITH INTENT TO RAVISH.—Opinion indicated by the Court, that it is incompetent, under a charge of this nature, to prove that a Rape was actually committed.

No. 42.
William
Byrne.

Assault,&c.

WILLIAM BYRNE was charged with Assault with intent to ravish, and to the serious injury of the person.

He pleaded not guilty, and a proof was led.

In the course of the examination of the girl upon whom the assault was charged to have been committed, she deponed, not only to the assault, but also to the actual completion of the crime of rape.

The LORD JUSTICE-CLERK expressed an opinion, that evidence of this nature could not be received under the present Indictment.

INNES, for the prosecution, argued,—that the evidence was admissible in proof of the intent libelled, just as it would be competent, in a charge of housebreaking with intent to steal, to prove that an article was actually stolen.

LORD MONCREIFF having indicated a similar opinion to that of the Lord Justice-Clerk, the examination of the witness on this point was not persisted in; and the medical evidence subsequently given proved that she must have been mistaken.

The Jury found the pannel guilty.

In respect of which verdict of Assize, he was sentenced to be imprisoned in the Bridewell of Edinburgh, for the period of eighteen calendar months.

Nov. 19
1838.

Present,

THE LORD JUSTICE-CLERK,

LORDS MACKENZIE, MONCREIFF, MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE—*Innes.*

AGAINST

ALEXANDER LINDSAY AND ROBERT STRUTHERS.—*Pattison.*

FALSEHOOD, FRAUD, AND WILFUL IMPOSITION.—Two pannels who pleaded guilty to a charge of Falsehood, Fraud, and Wilful Imposition, committed by uttering as genuine certain papers in imitation of bank notes, sentenced, the one to transportation for seven years, and the other to twelve months imprisonment in Bridewell.

No. 43. Alexander Lindsay and Robert Struthers.

ALEXANDER LINDSAY and ROBERT STRUTHERS were brought to trial at the Stirling Circuit, on the 17th September 1838, on a charge of Falsehood, Fraud, and Wilful Imposition;

Falsehood, Fraud, &c.

IN SO FAR AS, (1.) on the 20th of March 1838, the said Alexander Lindsay and Robert Struthers having, both and each, or one or other of them, agreed to purchase a quey from James Brown, farmer at Dalfoil, in the parish of Balfron, and county of Stirling, and to pay the price of L.6 sterling or thereby therefor, the said Alexander Lindsay and Robert Struthers did, both and each or one or other of them, time above libelled, at or near Dalfoil aforesaid, wickedly, feloniously, and fraudulently deliver to the said James Brown, six or thereby papers, each of them engraved or printed in imitation of bank notes, and in the following or similar terms:—

'£1. *Commercial Bank* £1.
' *of Newmillmoor.*

' Promise to pay to A. Lindsay or bearer One pound on demand at ' the office here.

Edinburgh

_____ P. Cash^r.

' N°. _____ P. Acco^t.

' Ent^d. _____ 18 _____

or in terms similar thereto, in payment of the price of the said quey, meaning and intending the same to pass for and to be received as the genuine notes of the Commercial Bank of Scotland, or of some other existing bank, whereas the truth was, and they well knew, that the said

papers were not notes of any real existing bank, nor of the value they bore, nor of any real value, but had been prepared by, or at the desire of the said Alexander Lindsay and Robert Struthers, or of one or other of them, for the purpose of cheating, and they did thereby impose upon and defraud the said James Brown: LIKEAS, (2.) time above libelled, the said Alexander Lindsay and Robert Struthers having, both and each, or one or other of them, agreed to purchase a cow and and a quey from John Brown, farmer at Ballochern, in the parish of Balfron aforesaid, and to pay the price of L.15 sterling or thereby therefor, the said Alexander Lindsay and Robert Struthers did, both and each or one or other of them, time aforesaid, at or near Ballochern aforesaid, wickedly, feloniously, and fraudulently deliver to the said John Brown, fifteen or thereby papers, each of them engraved, or printed in imitation of bank notes in the terms before quoted, or in similar terms, in payment of the price of the said cow and quey, meaning and intending the same to pass for and be received as the genuine notes of the Commercial Bank of Scotland, or of some other existing bank, whereas the truth was, and they well knew, &c. &c. (with two other similar charges.)

No. 43. Alexander Lindsay and Robert Struthers, Nov. 19 1838

Falsehood, Fraud, &c.

The pannel, Alexander Lindsay, pleaded guilty of all the charges, and the pannel Robert Struthers, of the first and third.

LORD MEADOWBANK, considering that the practice of the Court had varied, in regard to the punishment to be awarded against offences of this nature, certified the case to the High Court of Justiciary. It came to be advised this day.

PATTISON, for the pannel Struthers, pleaded in mitigation of punishment, that he had had no hand in the construction of the notes, and had already been four months in Jail.

LORD MACKENZIE.—The pannels certainly stand in different circumstances. Alexander Lindsay has pleaded guilty to the whole four acts charged against him, and these are acts of great criminality. It appears from his confession, and from his declaration, which is before us in virtue of that confession, that he possessed himself of a great number, to the extent of a hundred, of these notes—which are not exactly forgeries, but are so made as to impose on ignorant people, and actually did so on four dif-

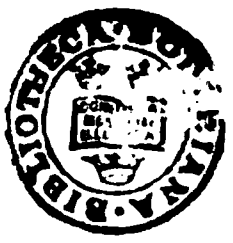
No. 43. Alexander Lindsay and Robert Struthers, Nov. 19 1838.

Falsehood, Fraud, &c.

ferent occasions. It is impossible that we can award against this pannel a less sentence than one of transportation. The guilt of the other pannel is not so aggravated, as he appears to have been led into the commission of the crime, by accidental connection with Lindsay on two occasions. I propose, in regard to him, that he suffer imprisonment in Bridewell for one year.

The other Judges expressed their concurrence; LORD MONCREIFF observing, that he could scarcely conceive a more impudent fraud, six out of the eight notes uttered on one of the occasions libelled, actually bearing to be payable to the pannel Lindsay by name, and exhibiting what was evidently intended to represent a signature.

The pannel, Alexander Lindsay, was accordingly sentenced to be transported beyond seas, for the period of seven years; and the pannel Robert Struthers, to be imprisoned in the Bridewell of Edinburgh, for the period of twelve calendar months.



GEORGE CRAWFORD, Suspender,—*Macfarlane.*

AGAINST

WILSON AND JAMESONS, Respondents,—*M'Neill—Munro.*

SUSPENSION AND LIBERATION.—MASTER AND APPRENTICE.—STATUTE 4th GEORGE IV. c. 34.—LOCUS DELICTI.—WARRANT.—1. The provisions of the statute, 4th Geo. IV. c. 34, are applicable to the case of an Apprentice under a regular indenture, with a cautioner, and a clause of registration.

2. It is no ground for suspending a judgment under the above or any similar statute, that the petition to the Justices in which the proceedings originated, was undated,—a date being affixed to the relative oath of the petitioner, and to the warrant granted by the Justice.

3. The judgment of the Justices is not subject to any review on the merits.

4. Reasons of suspension founded *inter alia*, on the want of any sufficient specification of the *locus delicti* in the original complaint, repelled.

5. The judgment suspended, on the ground that the party complained against was apprehended under a warrant granted merely to *convene* him before the Justices.

No. 44. Crawford *v.* Wilson and Jamesons, Nov. 19 1838.

Susp. and Lib.

The Suspender, in February 1835, entered into the service of the Respondents, under an indenture, binding him for five years as their apprentice, in the heckling department of their trade of flax-spinners. A certain weekly sum was stipulated for as the Suspender's wages, rising in amount for each successive year of his service; and it was also provided, that for every day he should neglect his work, he should be obliged to serve additional days at the expiry of his apprenticeship. The Suspender's father was bound along with him as his cautioner, and the indenture contained a clause of registration in the usual style.

On the 5th October 1838, the Respondents presented to the Justices of the Peace for the county of Ayr, a petition, under the act 4th Geo. IV. c. 34,[1] setting forth, that the Suspender had "frequently within the last four "months been guilty of misconduct and ill-behaviour to-"wards the petitioners, his said masters, by disobedience

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[1] This act, after reciting the statutes 20th Geo. II. c. 19, 6th Geo. III. c. 25, and 4th Geo. IV. c. 29, provides, (§ 1.) "That it shall and "may be lawful not only for any master or mistress, but also for his or "her steward, manager, or agent, to make complaint upon oath against "any apprentice within the meaning of the said before recited acts, to "any Justice of the Peace of the county or place where such apprentice "shall be employed, of or for any misdemeanor, misconduct, or ill-be-"haviour, of any such apprentice, or if such apprentice shall have ab-"sconded, it shall be lawful for any Justice of the Peace of the county "or place where such apprentice shall be found, or where such appren-"tice shall have been employed, and such Justice is hereby empowered, "upon complaint thereof made upon oath by such master, mistress, "steward, manager, or agent, which oath the said Justice is hereby "empowered to administer, to issue his warrant for apprehending every "such apprentice; and farther, that it shall be lawful for any such "Justice to hear and determine the same complaint and to punish the "offender, by abating the whole, or any part of his or her wages, or "otherwise by commitment to the house of correction, there to remain "and be held to hard labour for a reasonable time, not exceeding three "months."

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" of their and their foreman's lawful orders, by idling his " time, and refusing to perform the usual and necessary " quantity of work, or even as much work as he was pre- " viously in the practice of performing when he was a " younger apprentice, and to such an extent has the mis- " conduct of the said George Crawford been carried in " this last respect, that he frequently refuses to perform " as much work or labour, as is sufficient to indemnify the " petitioners for the actual weekly wages paid him in " terms of the indenture, calculating the price of the " work at the usual rates."

The petition prayed the Justices " to take the oaths of " the petitioners, or the oath of any one of them, to the " facts before stated, grant warrant to convene the said " George Crawford before them for examination, and " thereafter, on the facts before stated being established, " to grant warrant to imprison him in the tolbooth of Ayr, " for any period not exceeding three calendar months, as a " punishment for his said offence, or to punish him other- " wise as may be authorised by common law, or by the " foresaid act of parliament, and find him liable in ex- " penses, grant warrant to cite witnesses, reserving the " obligations in the indenture entire, and all actions upon " them, both against the apprentice and his cautioner."

One of the Justices having taken the oath of William Wilson, one of the petitioners, to the truth of this complaint, granted warrant " to convene the said George Craw- " ford for examination as craved, and also for summoning " witnesses for both parties." On this warrant the Suspender was taken to Ayr on the 8th of October, and brought before two Justices of the Peace there.

He pleaded not guilty. Two witnesses were examined, and the following sentence pronounced: " At Ayr, the " 8th day of October 1838. The Justices having consi- " dered the petition, denial of the defender, proof adduced, " and whole proceedings, find that the defender George " Crawford has been proved to have been guilty of mis- " conduct and ill-behaviour, and therefore grant warrant

"to commit him to the Jail of Ayr, there to remain and "to be held to hard labour for the period of one calendar "month from this date, as authorised by the statute, 4th "Geo. IV. c. 34, libelled. (Signed) J. Cowan, J. P. "George M'Taggert, J. P."

Crawford having been incarcerated under this sentence, presented to the Court a bill of suspension and liberation, on the following grounds :—

1. The original petition was incompetent, and liable to fatal objections. (1.) It is at least a very doubtful question, whether the statute 4th Geo. IV. c. 34, can be held to apply to apprentices under a special indenture, (Bookless *v.* Normand, 20th November 1832, 11 Shaw and Dunlop, p. 50.) No attempt was made to enforce the Suspender's engagements, by recording the indenture, and charging him and his cautioner; nor was any intimation made to either of them, that any ground of complaint existed. (2.) No sufficient notice was given to the Suspender, of the time, or place, or description of delinquencies alleged against him. With regard to the *time* of the alleged offences, a latitude of four months is taken in the petition, besides which they are stated to have been committed "frequently, within *the last four months*," and the petition bears no date. As to the *place*, there is in no part of the petition any specification of the *locus delicti*, which has been decided to be of the substance of any charge, and not mere form, (Yeaman *v.* Tod, 11th July 1836. Swinton, Vol. 1. p. 247.) and without which it does not appear that the Justices of the Peace for Ayrshire had any jurisdiction in the matter. And in regard to the *description* of the offences charged, there is no distinct specification of the circumstances in which the alleged "misconduct and ill-behaviour" took place.

2. The procedure which followed on the petition, was in many essential respects illegal and irregular. (1.) The Respondents, instead of asking a warrant of apprehension against the Suspender, which alone the statute authorises,

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merely prayed the Justices, "to grant warrant to *convene*" him before them for examination. The warrant actually granted was in the terms craved; and under that warrant, the forcible apprehension and detention of the Suspender as a prisoner was incompetent. (2.) The sentence pronounced by the Justices was defective, in as much as it did not specify whether the "misconduct and ill-behaviour," of which the Suspender was found guilty, were those libelled, or of what description they were.

3. The procedure and sentence complained of were groundless and oppressive, (1.) because the proof was insufficient, and (2.) because the Respondents regularly and duly paid to the Suspender the whole wages to which he was entitled under his indenture; and on the 16th of October, being the day after they had procured the warrant for his examination, and the second day before his actual apprehension, they paid him, without objection, or reservation of any sort, sixteen shillings, being two weeks wages which fell due on that day.

The Respondents answered:—

1. The objections taken to the petition, on which the conviction proceeded, are groundless. (1.) The statute 4th Geo. IV. c. 34, must be applicable, because the word "Apprentice," can mean nothing else than a party bound under a written indenture. (2.) The statements in the petition of the time, place, and manner of the delinquencies alleged are quite sufficient. The oath emitted by the Respondent William Wilson, bears date 5th October 1838, and being a necessary appendage and portion of the petition, it proves the date at which it was presented, and the warrant granted by the Justice is of the same date. (Macleod *v.* Buchanan, 10th June, 1837. 15 Dunlop and Bell, p. 1113.) In regard to *time*, no latitude is taken, as the charge against the Suspender consists of a series of misconduct, extending over the whole four months. And as to the *locus delicti*, the petition states that the

Respondents are flax-spinners *at Kilbirnie*, and sufficiently indicates the locality of the offence, by describing the Suspender as having entered and continued in their service. The manner and circumstances of the offences charged, are sufficiently set forth. Besides, the terms of the statute (§ 5.) exclude objections of this nature, unless they had been taken before the Justices.[1]

2. The procedure which followed on the petition was perfectly regular. (1.) The warrant was duly executed; and if the Suspender came to the Court at Ayr along with the officer, he did so freely and without compulsion. Besides, having pleaded to the complaint, and allowed the trial to proceed, without any objections on this head, it cannot form a reason for suspending the judgment, that he was brought to the place by undue means. (2.) The terms employed in the sentence are those of the statute itself.

3. The sentence is not liable to review on the merits. But, (1.) the charges against the Suspender were fully proved, and (2.) no argument can be derived from the fact of the Respondents not having withheld payment of his wages, as they had no right to take the law into their own hands, and the payment made by them did not deprive the Justices of the power of awarding the alternative punishment provided by the statute, as it is plainly future wages which are contemplated as the subject of abatement.

The case came to be advised this day.

MACFARLANE, for the Suspender, pleaded, that the proceedings against him must be set aside, on the grounds contained in the reasons of suspension. The case of Yeaman *v.* Tod, (Swinton, Vol. 1. p. 247,) is quite conclusive

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[1] This section, after referring to the Acts 20th Geo. II. c. 19, and 31st Geo. II. c. 11, provides, that "every order or determination of "such Justice or Justices made under this Act shall be final and con- "clusive, any thing in either of the said Acts contained to the contrary "in any wise notwithstanding."

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as to necessity of the *locus delicti* being distinctly specified in a complaint of this nature. It does not even appear that the Suspender was employed within the county of Ayr. And this objection is not answered by the circumstance of the designation of the masters being contained in the complaint. For the party complained against in Yeaman's case, was designed as " vintner and spirit dealer, Strathmiglo,"—and yet it was held that the want of a specific *locus* was fatal—principally on the ground, that unless the offence was committed within the county, there was no jurisdiction. Then the only warrant which the statute authorises the Justices to grant, is a warrant to *apprehend* the party complained against. But the warrant granted in this case, was one to *convene* him before them for examination. And under that warrant—even were it legal—the officer had no authority to seize the Suspender, and carry him as a prisoner to Ayr. Nor is it any answer to these objections, that the plea of irregularity was not stated in the Inferior Court. On the merits, if a review be competent, one act of disobedience only was established against the Suspender. The idleness of which he was accused, was not referred to any particular period of time. And although power is given to the Justices, either to imprison, or " to punish the offender, by abating " the whole or any part of his or her wages," the Respondents, by paying up his wages after their complaint was presented, prevented the possibility of resorting to the more lenient alternative.

M'NEILL, for the Respondents, answered,—the Suspender is not a boy, but a man twenty years of age, which, if the merits are to be gone into, is of some consequence. But the reasons of suspension are entirely unfounded. The *locus delicti* is sufficiently specified, by the designation of the Respondents being given,—by the statement that the Suspender was in their service,—and by the fact of the offence being one, which must have been committed where the business was carried on. The case of Yeaman *v.* Tod was quite different, as the crime charged was embezzle-

ment. Then as to the warrant, and the proceedings under it, as the warrant authorised by the statute is one to *apprehend* the party, that is the construction which must, in the circumstances of this case, be placed on the generic term "*to convene*." But suppose the case were different, the fact of the officer having committed an excess of power, does not at all annul the proceedings before the Justices. If the party, after having been wrongously apprehended, appeared, and though assisted by an agent, took no objection to the regularity of the proceedings, they cannot now be set aside. It is no argument against the Respondents, that they performed their part of the contract under the indenture, by paying the Suspender his wages. The abatement contemplated by the statute as one of the modes of punishment, is clearly of future wages only.

The Court held, that the only question of any difficulty was, whether the Suspender had been apprehended and taken to Ayr, under a legal warrant.

Judgment was delayed till the 24th of November.

Nov. 24 1838.

When the Court met on that day—

The LORD JUSTICE-CLERK inquired, whether the counsel for the Respondents were prepared to admit or to deny that the Suspender was *de facto* apprehended, and carried to Ayr.

M'NEILL, for the Respondents, answered,—that according to his information, the officer found the Suspender in bed between one and two in the morning, read the warrant to him, and told him that it was a warrant to take him to Ayr—that the Suspender asked, whether, if he went, he would have the assistance of an agent—that the officer told him he would—and that on that assurance he went with the officer to Ayr.

MACFARLANE, for the Suspender, averred, and offered to prove, that he went as a prisoner.

LORD MACKENZIE.—I must assume that the Suspen-

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der went with the officer under compulsion; and I am decidedly of opinion that there was no legal warrant to *apprehend*, but only a warrant to *convene*. In regard to the other objections,—I think I could have got over them all without much difficulty. But it is needless to advert to them, as in consequence of the officer having exceeded the powers contained in his warrant, the whole proceedings must be held to be null. Even if the Suspender had accompanied the officer willingly, the question would not have been unattended with doubt, as there is no authority in the statute for a warrant of this nature.

LORD MONCREIFF.—I concur. There can be no doubt that the Justices intended to grant a warrant to apprehend the Suspender. For that is what the statute enjoins them to do. But I have all along been of opinion, that the warrant they did actually grant, was not one under which he could be legally apprehended. And I can find no case which sanctions an opposite doctrine. I do not know what effect upon my mind a fuller discussion of the point might have; but, as at present advised, I am clearly of opinion, that if the Suspender had successfully resisted this warrant, he could not have been indicted for deforcement. I concur in the doubt expressed by Lord Mackenzie, as to whether the Justices could legally grant a warrant to cite or *convene* the party—or any warrant except one to *apprehend* him, though, if the Suspender had accompanied the officer willingly, it might have been doubtful, whether their proceedings against him must, on that account, have been set aside. But, as the case comes before us, these proceedings are null from the very commencement. It is unnecessary to enter upon the other objections, but I may observe, that it does appear singular, that the Respondents should have paid the Suspender his wages in full, after the complaint against him was lodged.

LORD MEDWYN.—I do not differ as to the effect which must be given to the apprehension of the Suspender. But this is the only matter of form which creates any difficulty in my mind. In regard to the want of a date to the peti-

tion, we have already frequently decided, that the date of such an application is the date at which it is presented. I think also that the *locus delicti* is sufficiently indicated, and that the case is easily distinguishable from that of Yeaman on this point. I am unwilling to say, that because the statute gives a power to apprehend the party complained against, the gentler mode of citing him before the Justices would have been illegal, and must of itself have led to the proceedings being quashed. But the warrant was not to *apprehend* the Suspender, but only to *convene* him for examination. If the counsel for the Respondents could have shewn, that to *convene* was a generic term, including to *apprehend*, as well as to *cite* or *summon*, the case would have been different. But to convene is merely to summon—to cite—or bring into Court. It is quite evident that the constable thought he had a warrant to apprehend the party, and acted accordingly. And on that ground alone, I concur in thinking that the judgment must be suspended.

LORD COCKBURN.—I am sorry that it is not in my power to differ. I wish that all statutes of this nature contained a provision, that a judgment of the Inferior Courts was not to be set aside for errors in point of form, unless the Court were satisfied, first, that they were errors wilfully committed, and, secondly, that they had led to actual injustice. But that is matter for the consideration of the Legislature, and not of a court of law. In the present case, the Suspender was not brought legally into Court, and therefore I am bound to concur in holding the whole proceedings against him to be null.

The LORD JUSTICE-CLERK.—The sole difficulty of the case arises from this, that the Magistrates, instead of at once apprehending the Suspender, listened to a petition which asked them merely to convene him before them for examination. I am quite clear, that even if he had gone voluntarily before the Justices, the legality of the after proceedings against him would have involved a question requiring some consideration. For it is worthy of remark,

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that in the case of servants complaining of the stewards or managers for their absent masters, the Justices are empowered, by the fourth section of this very statute, to *summon* such steward or manager. No authority is given for their apprehension. But the form of proceeding against apprentices is quite different. On this single point, therefore, I agree in thinking that the judgment must be suspended. I think it right, however, to state my opinion, that there is no legitimate ground for an action of damages against the Justices, for having granted, what was an innocent—in one sense, an inoperative warrant. I agree with Lord Medwyn, that there is nothing in any of the other objections. And I am quite clear that the judgment of the Justices is not reviewable on the merits.

The Court accordingly passed the bill, sustained the reason of suspension, that it was incompetent to apprehend the complainer under a warrant granted to convene him before the Justices, and repelled the other reasons of suspension, and found the complainer entitled to expenses.

MENZIES AND MFNTEATH, W.S.—THOMAS LANDALE, S.S.C. *Agents.*

Nov. 26 1838.

Present,

LORDS MEADOWBANK, MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE—*Lord Advocate Murray—Innes.*

AGAINST

MARGARET MACKENZIE—*Craufurd.*

AGGRAVATION OF HABITE AND REPUTE.—This aggravation is sufficiently established, by proof of the existence of the evil repute in which the pannel has been held, for the requisite period, and it is not necessary for the Prosecutor to show, that that repute is founded on sufficient grounds.

No. 45. Margaret Mackenzie.

Theft, &c.

MARGARET MACKENZIE was charged with Theft, aggravated by her being habite and repute a thief, and having been previously convicted of theft. She pleaded not guilty.

No. 45. Margaret Mackenzie, Nov. 26 1838. Theft, &c.

The substantive charges against her, consisting of three acts of theft from her step-father, committed in the months of September and October 1838, were clearly established. Three previous convictions of theft from the same party, before the Police Court of Leith, dated respectively 20th June, 10th August, and 22d September 1837, were also proved. Two Police-officers deponed that the pannel was habite and repute a common thief, and was so considered at the Police-office; but on cross-examination, they could state no reasons for their opinion, except that she had been previously convicted of theft, and had not, so far as they were aware, any honest mode of gaining a livelihood.

The LORD ADVOCATE, for the prosecution, argued,—that the evidence was amply sufficient to establish against the pannel the aggravation of habite and repute, especially since no exculpatory evidence had been led. This aggravation is totally distinct from that of previous conviction, and is established by proof of the pannel being generally reputed to be a thief, in the quarters where she is known, and especially at the Police-office. (Hume, Vol. i. p. 93.)

CRAUFURD, for the pannel, answered,—that the aggravation of habite and repute was not established. The Policemen had been tested as to the grounds of their opinion, and these were not such as to warrant them in affixing the character of a common thief on the pannel, especially as they did not swear that she associated with thieves. The question is one of much importance, as habite and repute is often charged as an aggravation without any previous conviction, and the effect of it is to raise a single act of theft into a capital offence.

LORD MEADOWBANK, in charging the Jury, observed,—that, in his own opinion, the aggravation of habite and repute was as clearly proved as all the rest of the case. His Lordship laid it down, that if two Police-officers deponed that the pannel was habite and repute a common thief, even though they added that they did not believe that the repute was well founded, the aggravation was

No. 45. Margaret Mackenzie, Nov. 26 1838.

proven. The Jury have nothing to do with the grounds of the repute in which the pannel is held, it being sufficient if the repute itself is proven.

Theft, &c.

The Jury unanimously found the pannel guilty of Theft, aggravated as libelled, with the exception of the aggravation of habite and repute, which, by a plurality of voices, they found not proven.

In respect of which verdict of Assize, she was sentenced to be transported beyond seas, for the period of five years. [1]

HER MAJESTY'S ADVOCATE—*Lord Advocate Murray—Innes.*

AGAINST

ARCHIBALD M'QUILKIN—*Irving.*

LOCUS DELICTI.—INDICTMENT.—An error in the description of the *locus delicti* found fatal, though it existed also in the pannel's designation, as contained in the Indictment to which he had pleaded—and as set forth in his declaration.

No. 46. Archibald M'Quilkin, Nov. 26 1838.

ARCHIBALD M'QUILKIN, seaman, "lately residing with "Ann Ridley or Saunders, widow, now or lately residing "in Jack's close, South Leith," was charged with aggravated Theft:

Theft, &c.

[1] It is in recent practice only, and partly, it is believed, in consequence of the provisions of the late criminal statutes applicable to England, that sentences of transportation for this period, or for ten years, have become usual. These terms of punishment are not reserved for any particular crimes, but are awarded, at the discretion of the Court, in all offences in which transportation is the common sentence. Thus, during the Circuits in Autumn 1838, George Whyte was sentenced at Glasgow to be transported for five years, for breach of trust and embezzlement to the extent of above L.130. And Adam Liddell received the same sentence at Stirling, on a confession of the crime of robbery. At Inverness, in like manner, various pannels received sentence of ten years transportation, for acts of housebreaking and aggravated theft; and George Smith was punished in the same way at Aberdeen, for the theft of four bullocks.

No. 46. Archibald M'Quilkin, Nov. 26 1838.

Theft, &c.

IN SO FAR AS, on the 30th of July 1838, within the house situated in Jack's close, South Leith, aforesaid, then and now or lately occupied by the said Ann Ridley or Saunders, the said Archibald M'Quilkin did wickedly and feloniously steal and theftuously away take a gown, the property or in the lawful possession of Ann Wilson, then and now or lately residing with the said Ann Ridley or Saunders, or in the lawful possession of the said Ann Ridley or Saunders.

The pannel pleaded not guilty.

In his declaration he stated, that at the time libelled, he resided with Mrs. Saunders in *Jack's close;* but on evidence being led, it appeared that Mrs. Saunders lived in *Lawnes'* close, and that the witnesses did not know any close in South Leith named *Jack's* close, or any other Mrs. Saunders.

The LORD ADVOCATE, for the prosecution, argued,—that the pannel having pleaded to an Indictment, in which he was designed as residing with Mrs. Saunders in *Jack's* close, and having given the same description of his residence in his declaration, was not now entitled to found on the error which had occurred in the statement of the *locus delicti.*

The Court held the error fatal to the charge, and the Jury, under their direction, found the pannel not guilty.

In respect of which verdict of Assize, he was assoilzied *simpliciter*, and dismissed from the bar.

Present,

Dec. 3 1838.

LORDS MEADOWBANK, MACKENZIE, MEDWYN.

HER MAJESTY'S ADVOCATE.—*Lord Advocate Murray—Innes.*

AGAINST

DONALD KENNEDY—*M'Neill—Craufurd.*

DISCHARGING LOADED FIRE-ARMS.—STATUTE 10TH GEO. IV. c. 38.—ASSIZE.—WITNESS.—PRODUCTION.—1. A landed proprietor convicted at common law, of wounding two persons whom he found

poaching on his land, by discharging both barrels of his fowling-piece at them. Sentence, eight months imprisonment.

2. A majority of landed men chosen on the Jury, in respect the pannel was a landed man.
3. The Indictment being laid both at common law, and under the statute, a verdict finding the pannel guilty as libelled, "but not with the intention of doing any serious bodily harm," held to be a good conviction of the offence, at common law, but no judgment moved for on the statutory charge.
4. It is incompetent to contradict the evidence of the injured party, as to the transaction which is the subject of trial, by proving on his cross-examination, that he had given a different account of it three days afterwards.
5. The party injured having denied on cross-examination, that he told a particular witness, some time after the injury, that he kept the house in order to give him a better claim of damages against the pannel,—held, that it was incompetent to contradict this statement, by the evidence of the witness referred to.
6. The witnesses to the *corpus delicti* having deponed, that they pointed out the particular spots where certain occurrences took place, to a Land-surveyor, and the surveyor having sworn that these spots were correctly marked on a plan of the *locus* prepared by him, this plan allowed to be produced, although its effect was in some degree to contradict the evidence of the witnesses; but certain marginal references, containing matter which could not have been communicated by them, cut off, before the plan was handed to the Jury.

No. 47. Donald Kennedy, Dec. 3 1838.

Discharging Loaded Fire-arms.

DONALD KENNEDY, Esquire of Bogbain, in the parish of Tain, and county of Ross, was charged with the crime of wilfully, maliciously, and unlawfully discharging loaded fire-arms at any of the lieges, more especially when committed to the serious injury of the person, and to the effusion of blood, as also with contravention of the Act 10th Geo. IV. c. 38, intituled "An Act for the more effectual punishment of attempts to murder in certain cases in Scotland, by which it is enacted," (§ 2.)

"That from and after the passing of this act, if any person shall, within Scotland, wilfully, maliciously, and unlawfully shoot at any of his Majesty's subjects, or shall wilfully, maliciously, and unlawfully present, point, or level any kind of loaded fire-arms at any of his Majesty's subjects, and attempt by drawing a trigger, or in any other manner, to discharge the same at or against his or their person or persons; or shall wilfully, maliciously, and unlawfully stab or cut

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"any of his Majesty's subjects, with intent in so doing, or by means "thereof, to murder, or to maim, disfigure, or disable, such his Majesty's "subject or subjects, or with intent to do some other grievous bodily "harm to such his Majesty's subject or subjects; or shall wilfully "maliciously, and unlawfully administer to, or cause to be administered "to, or taken by, any of his Majesty's subjects, any deadly poison, or "other noxious and destructive substance or thing, with intent thereby, "or by means thereof, to murder or disable such his Majesty's subject "or subjects, or with intent to do some other grievous bodily harm to "such his Majesty's subject or subjects; or shall wilfully, malicious-"ly, and unlawfully attempt to suffocate, or to strangle, or to drown, "any of his Majesty's subject or subjects, with the intent thereby, or by "means thereof, to murder or disable such his Majesty's subject or "subjects, or with intent to do some other grievous bodily harm to "such his Majesty's subject or subjects; such persons so offending, "and being lawfully found guilty, actor, or art and part, of any one or "more of the several offences herein before enumerated, shall be held "guilty of a capital crime, and shall receive sentence of death accord-"ingly;"

or alternatively with one or other of these crimes;

IN SO FAR AS, upon the 5th day of September 1838, at or near to the house or cottage situated on or near Woodbank, otherwise called Garrick, in the parish and county aforesaid, and which house or cottage was then occupied or possessed, under the said Donald Kennedy, by Norman Smart, labourer, the said Donald Kennedy did wilfully, maliciously, and unlawfully discharge both, or one of the barrels of a double barrelled gun or fowling piece, loaded with gun-powder and with leaden shot or pellets, or with some other hard substance to the prosecutor unknown, at the persons respectively of David Fridge, house-carpenter, son of, and residing with James Fridge, house-carpenter, residing at Highmills, in the parish of Tain aforesaid, and Alexander Fridge, house-carpenter, son of, and residing with Alexander Fridge, senior, house-carpenter, residing at Aldie, in the parish and county aforesaid, or one or other of them; and part of the said leaden shot or pellets, with which one of the said barrels was loaded, entered the person of the said David Fridge, and did wound him in or near to the head, back, and right arm; and part of the said leaden shot or pellets, with which the same barrel, or the other of the said barrels, was loaded, entered the person of the said Alexander Fridge, and did wound him in or near to the back and left arm, to the serious injury of the persons respectively of the said David Fridge, and Alexander Fridge, and to the effusion of their blood.

The pannel pleaded not guilty, and special Defences to

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Discharging Loaded Fire-arms.

the following effect had been lodged for him, along with a list of exculpatory witnesses;

"The pannel is well known, both at Inverness, in the neighbourhood of which town he generally resides, and in Ross-shire, where his property of Bogbain is situated; his character will be proved to be that of a humane, charitable, and kind-hearted man, and he trusts he may be permitted to declare, that he is incapable of intentionally injuring a fellow creature. He denies the libel, and pleads generally not guilty of the crimes at common law, and under the statute, as therein charged. If the lads mentioned in the Indictment, or either of them, were injured by a shot discharged by the pannel, such injury was accidental, and he sincerely regrets it. The pannel has herewith lodged with the clerk of Court, a sketch or plan of the ground where the offences set forth in the Indictment are said to have been committed, prepared, and to be authenticated by Mr. David Davidson, land-surveyor in Tain."

The pannel being a landed man, the Assize consisted of twenty-four landed men, and twenty-one common Jurors. Eight of the Jury were chosen from the former class, and seven from the latter.

EVIDENCE FOR THE PROSECUTION.

GEORGE CAMERON, *Sheriff-substitute of Ross and Cromarty*, prove the pannel's declaration.

Cross-examined by M'NEILL *for the pannel.*—The pannel came willingly, and of his own accord, to be examined. I do not recollect whether he made any motion showing whether, when he fired, he had the gun at his shoulder. He is in extensive business as a wood-merchant, and is a respectable man.

DAVID FRIDGE, *house-carpenter, residing at High Mills, in the parish of Tain.*—In September last I was living at my father's house, which is two or three miles distant from Bogbain. My cousin, Alexander Fridge, and I were in company, early in the morning of the fifth of September. We went to see a friend of mine. We had guns, and fired two shots. Neither of these were on the land of Bogbain, but near it. The shot I fired was between four and five o'clock. My cousin had fired one before. Soon after I had fired, as I got to the end of Norman Smart's house, I saw the pannel standing at the distance of twenty-three or twenty-four yards. He called out, "Fridge, Fridge, stop." I could not stop when I got the shot. I had not time to stop, it was so immediate after the call. I did not see the gun raised. I

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was then running away. It hit me on the back, arm, and head. The pannel was standing to my left. I ran to the right. I have no doubt that the shot was fired by the pannel. I continued to run after I got the shot, so did my cousin. Another shot was fired at him. He was running with me. He was close to me, when the first shot was fired, but afterwards diverged to the right. There was a little bank between the road and an adjoining wood, and it was as he was getting over this bank into the wood, that the second shot was fired at my cousin. He told me this afterwards. I was a little way in the wood when the second shot was fired. We went to the smith's house at Arabella, and intended to have gone farther, but were unable, from the injuries we had received. I examined my wounds at the smith's house, and found I had been severely wounded. There were four pellets in my arm, six in my back, one in my head, and one in the back of my thigh. The pellets were number two. I sent for assistance, and had blood taken, and was afterwards visited by Dr. Ross, and Dr. Monro from Tain. I was laid up for some time, suffered a great deal of pain, and lost a great deal of blood. I have told all that took place between the pannel and me that morning. There was no provocation, and no conversation farther than what I have told.

By the COURT.—After I turned away from the pannel, I had run about fifteen yards before the first shot was fired.

Cross-examined by M'NEILL *for the pannel.*—I have since measured the distance between the place where I saw the pannel, and where I got the shot. It is forty yards. I pointed out all the places of which I have spoken to Mr. Davidson, land-surveyor. The pannel did not name my Christian name. There are several of the name. It was a wet morning. When we got through the wood, we came upon an open moor, which is to the south of the wood. I joined Alexander again on the moor. The place where I entered the wood was a few yards distant from the place where I was struck with the shot. It was on the right arm that I was struck. My cousin was on that side, close to me. The pannel was behind me. Smart's house and the wood are on the pannel's property, but not the moor. The smith's shop is two miles distant from the place where I got the shot. Dr. Ross came about the middle of the day, and examined me. I remained eight days at the smith's, and was confined to the house all that time. I did not go out at all. After that I went home. I was three days after I got home, during which I could not turn in bed, and was confined for a few weeks at home. Dr. M'Candy attended me at that time. I am quite sure I was not out during the eight days I was at the smith's. Finlay Ross visited me while I was there. I talked to him about my injury. I cannot say whether I gave him the same account I have given now. I have told the truth now. I do not recollect what I told him, but I had no intention of telling him what was untrue.

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By the COURT.—I was in bed when Ross visited me.

By M'NEILL.—Janet M'Donald was the friend whom I was going to visit that morning. I had made an arrangement with my cousin about going out.

By INNES.—It would be about a minute between the two shots. I had gone about ten yards after receiving the first shot, before I heard the other. One of the pellets had gone through my arm. It went through about three inches of flesh.

By the COURT.—I did not cry out when I felt the shot. My cousin did not cry out, either when the first or the second shot was fired.

By M'NEILL.—I ran away when I saw the pannel, because I was frightened for him, as we had our guns.

By a JURYMAN.—When I say I had not time to stop before he fired, and that I had run fifteen yards after I saw the pannel, I mean that I was too much frightened to stop.

ALEXANDER FRIDGE, *house-carpenter*.—I am cousin to the last witness. He and I went out on the night of the 4th September,—not with the object of shooting, but we had guns. I got one shot, and my cousin got one. His was the first. The last shot was at a hare. It was not then altogether day-light. In about twenty minutes afterwards, but before it was quite light, we saw the pannel. We were then close together. He was about twenty yards off, near Norman Smart's house. When we came in sight of him, he was standing, with a gun in his hand. When we saw him, we immediately turned off, and ran. I do not know how many yards we had run, when I heard a shot. When we first saw the pannel, his gun was resting on his arm. I did not see him do any thing before I turned. He called out, "Fridge, Fridge, stop!" I had turned round before he called this. When he fired the first shot, I felt that I was struck on the left arm. My cousin and I continued running towards a wood, and had run a few yards, perhaps about ten, when a second shot was fired. I had got upon a bank at the entry of the wood. I felt the shot on my left side. I continued running, ran through the wood, and made for the smith's shop at Arabella, which is more than two miles off. I was a good deal hurt by both shots. I did not look back after either shot. I saw no one else but the pannel. The shots came from the direction of the place where I had seen the pannel standing. I was visited by Dr. Ross at the smith's, and shewed him the wounds. He extracted one pellet from my side. There was also the mark of one in my back, and one in my arm. I was confined for eight days at the smith's. After that I went home, and was confined for some time longer there.

By the COURT.—The wound was on my left side. That was the side towards the pannel.

Cross-examined by M'NEILL, *for the pannel*.—David was very near me, on the left, when I received the first shot. When I got the second I saw David. He was before me in the wood. He had just got in. I

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pointed out to Mr. Davidson, surveyor, the place where I saw the pannel, and the place where I received the two shots. Mr. John Mackenzie was also present. It was a rainy morning. I did not stop when the pannel called to me, because I was frightened. I kept the house the whole eight days I was in the smith's house. I was not confined to bed, but was unable to go out. It was by the Doctor's direction that I kept the house. He did not bleed me. David was bled by Robert Mackay. He is a Doctor at his own hand. I was visited at the smith's by Finlay Ross, and some others. I talked to him about the injury I had got, and told him how I had got it. I did not give him the same account I have given to-day. I told him some things I have not told to-day. I told him I thought I was wounded by one shot only. This was not the truth. Ross is in Edinburgh.

LORD MEDWYN.—At what time did this conversation between the witness and Finlay Ross take place? Unless it was a part of the *res gesta*, the evidence is incompetent.

The WITNESS.—My conversation with Ross took place about three days after I received the injury.

LORD MEDWYN referred the counsel for the pannel to the decision of the Court in the case of William Hardy, Jan. 24. 1831, (Alison, Vol. ii. p. 525.)

CRAUFURD, for the pannel, observed,—that the question in Hardy's case was as to the account given by the party fired at, of the position in which he held his stick at the time. There was certainly a distinction between a circumstance of that kind, and the way in which the injury, which is the subject of the trial, was received.

The opinion of the Court being decidedly against the competency of the examination, it was not farther pressed.

The WITNESS.—I never walked home part of the way with Finlay Ross. I was confined to the house for a fortnight after I went home. I was not able to go far, never went out, and did not work at all. Finlay Ross did not visit me within that fortnight, and I had never a walk with him. I never told him, that I kept the house, in order to give me a better claim of damages against the pannel.

By INNES.—I was also visited, while at the smith's, by Dr. M'Candy. I was told he was sent by the pannel. I do not recollect if Mr. Kerr, the bank agent at Tain, visited me while at the smith's. Finlay Ross is a carrier, and sometimes works for the pannel.

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By M'NEILL.—He is a farmer also. He and I sometimes go fishing together at night, and have done so since the accident happened.

By the COURT.—The smith's name is John Fraser.

ALEXANDER FRIDGE, *senior, house-carpenter, residing at Aldie, in the parish of Tain.*—I remember of my son being out early in the morning of the 5th of September. William Findlay, the pannel's grieve, came to my house to inquire for him. I went with Findlay to Bogbain. I did not see the pannel at first. When I did see him, he told me that he had found my son on his property that morning,—that he had called on him to stop, but that he had made off. He did not tell me any more that took place. While we were talking, Norman Smart came up, and the pannel asked him if he had heard the report of a gun. He said he had heard three shots. The pannel on that said he had fired two of these himself.

Cross-examined by M'NEILL, *for the pannel.*—My son was confined for some time; so was David. The pannel shewed them attention during their illness—sent them wine, tea, porter, and other things, for a short space. I made no application to him for assistance for them to come here. He gave them some money, and gave one of them a plaid to come here.

By the LORD ADVOCATE.—I have often had conversations with the pannel about the young men. A short time after the affair happened, he said it would be a good thing for them to go out of the country before the trial came on.

By M'NEILL.—This was said on the property of Bogbain. I began the conversation that led to this remark.

By INNES.—What led me to this conversation was, that there had been an offer of L.220 to the young men between them, if they would leave the country.

By M'NEILL.—This offer was not made by the pannel.

By the COURT.—I could not say that the pannel seemed to know of the offer having been made. The offer was made to me. It was about a day after the offer was made, that I had the conversation with the pannel. I told him there had been an offer made, but did not tell him the amount. He disclaimed all knowledge of any such offer. In all the conversations I had with the pannel, it seemed to me that he surely thought that the shots had been the result of accident. This would be about eight days after it happened, and after my son came home. My son and his cousin kept the house some time after they came home. I considered their doing so necessary, from the state in which their bodies were, and not for the purpose of extorting money from the pannel.

By M'NEILL.—When I saw the pannel the morning after the occurrence, I did not know that the lads had been wounded. And nothing passed between us to lead me to suppose it.

By the COURT.—The first time I saw my son and nephew, was at one o'clock that day. They told me they had been wounded by the

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pannel. My son said he had been wounded by two shots. They told me they were standing on the road-side, on the pannel's property, and observed the pannel—that they made off, and that he fired immediately. They could not be sure at what distance they had been, when the shots were fired. I saw all Alexander's wounds. He said that the wound on the side was caused by the second shot. They both appeared to think that the pannel had taken an aim, but they could not be certain.

ALEXANDER CHISHOLM, *servant to the pannel for eight years.*—I remember the pannel sending for me to go out shooting, after breakfast, on the 5th of September. He shot some game. As we came home we found a hare, which he said he had shot in the morning. It had been shot, and apparently with a small ball, which the pannel told me had been the case.

WILLIAM BAILLIE ROSS, *M.D. residing in Tain.*—I was called on to attend the two Fridges at a smith's shop at Arabella, and along with Mr. Munro, prepared the report libelled on. (The report was then read, bearing, that the wounds were gun-shot, and appeared to have been inflicted by shot, No. 3 or 4, which had penetrated in a direction nearly horizontal.) The wounds were not dangerous, but both the Fridges had certainly received serious bodily injury. I only attended them twice professionally. I called a third time in the course of my usual rounds, but found that Mr. M'Candy, a surgeon, whom I understood to be a relation of the Fridges, had been called in.

By the COURT.—I thought they might have been removed to their house the day after the accident, more easily than several days afterwards. There would have been pain in removing them after the second day.

By M'NEILL.—The shot was not of a larger number than 3 or 4. Very little medical attendance would be required after I saw them.

By the COURT.—The whole of the wounds might have been caused by the same shot.

The pannel's declaration, dated 6th September 1838, was then read. It stated that about three o'clock on the previous morning, he had gone out in the hope of shooting a roe, taking with him his double barrelled gun, one barrel of which was charged with ball, and the other with buck shot: That he saw no roe, but fired both barrels at a hare, and killed it: That after this, he was returning home about half-past four, or between that and five o'clock, having reloaded both barrels of his gun with small shot, in case he should start another hare, when he heard a shot, and shortly afterwards saw two men, whom he believed to be poaching, and who immediately on perceiving

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him, ran off: That he recognised one of them, and called out to him by name, "That is you, Fridge, and you need not run away:" That they still ran on, and that he then, in order to frighten them, which was his sole purpose, fired both barrels of his gun, as he believed and intended over their heads; that upon this, the men appeared to raise up their coat-tails, as if to enable them to run the faster, and that he did not follow them any further; that neither of them gave any indication of being hurt; that he neither intended nor dreamed of having hurt them; and that if, as he is now informed, the shot took effect on either of them, he is very sorry for it; that when he returned home, he sent his grieve to the house of Fridge's father, thinking he might be able to find them, and take their guns, and see what game they had.

EVIDENCE IN EXCULPATION.

DAVID DAVIDSON, *land-surveyor in Tain.*—I examined that part of the property of Bogbain, near Smart's cottage. David Fridge went to the ground with me. He pointed out the place where he saw the pannel, and where he was when both shots were fired. I saw Alexander Fridge on the ground also. He pointed out where he was when he was hit by the first shot, and where he was when the second shot was fired, and the spot at which he entered the wood. I prepared the plan produced with the Defences, in which all these points are marked. I observed marks of shots upon the trees. They are delineated on the plan. This examination, from which I prepared the plan, was about a fortnight ago.

M'NEILL, for the pannel, then proposed to put the plan into the hands of the witness. (It contained marginal references, bearing generally to be founded on information given by the Fridges, but some of which were evidently not in that situation. One of the references, for example, was to the place "where David Fridge says Mr. Kenne-" dy stood when he fired the first shot," and another to "Mr Kennedy, where he says he first saw the Fridg-" es.")

The LORD ADVOCATE, for the prosecution, objected

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to the production of this plan. The effect of allowing it to be produced, would be to sanction an attempt, to contradict in an indirect way what the Fridges have sworn, by proof of what they told this witness when not on oath. They have not been shewn the marks on the plan, with the relative references; and to suppose that these marks correctly indicate the spots which they are intended to point out, would be to convict the Fridges of an absurdity, for according to the plan, the shot is made to pass through a house. Besides, an attempt is made in the plan to prove matters to which the Fridges could not speak; such as the place where the pannel was standing when he fired, at which time they have sworn that their backs were towards him.

M'NEILL, for the pannel, answered,—The object in producing the plan, is not to prove, what the pannel has never said,—that his shot did not take effect on the Fridges. If the objection to its production be sustained, the consequences will be most important, not only in this Court, but also in the civil Court. A plan is considered necessary for the ends of justice. None is produced by the prosecutor. The Fridges are not examined about a plan, but they are asked if they pointed out to the surveyor the true places where certain things occurred; and the surveyor swears that he marked these places correctly on the plan. It is true that they could not tell the position in which the pannel stood when their backs were towards him. But they knew where they were themselves when the shots were fired, and they have sworn that they pointed out these spots to the surveyor; when it is necessary to know exactly where these spots are, this can be proved only by a person of skill, who has made a plan of the locality, and measured the distances. The object of producing the plan is to show, that the second shot could not, from the distance, and fall of the ground, have taken effect on Alexander Fridge.

The Judges retired to consider the point. On their return, the following opinions were delivered:—

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LORD MACKENZIE.—I have given every degree of consideration to this question, and I certainly by no means intend to say, that this plan, as it stands just now, is to go to the Jury. A great deal of matter is contained in it, which may, I think, be objectionable. But that may be struck out. The references appended to the plan may be cut off; and if this is done, to the production of the mere plan, as a plan of the ground, there exists no objection. For nothing is of more frequent occurrence than the production of plans by one party or the other. But then the question arises, whether it is competent to prove by the surveyor, that he has put down on the plan the spots pointed out to him by the Fridges, and whether the plan can now be produced, in order to prove the exact position of these spots. My opinion is, that evidence of this nature is competent. A foundation has been laid for it, by its being proved by the Fridges, that they went out with the surveyor, and showed him the spots where they were, when the two shots were fired, and the spot where the pannel was when they first saw him,—not where he stood when he fired, for that they do not know, as their backs were towards him. I am confident that I have seen the same thing permitted in a great variety of cases, when a minute knowledge of the exact spots to which the evidence referred was necessary. And if evidence of this nature is admitted on the part of the Crown, I do not see how we can draw a distinction, when it is offered for the pannel. It is said, that to allow the production of this plan, is to contradict what has been said on oath, by an account of previous statements made by the witnesses. I do not think that this objection applies. For it is already proved that the Fridges pointed out the places to the surveyor. It is said also, that the plan ought to have been shewn to them, and they should have been asked, whether the places to which they referred were correctly marked. But this is very seldom done, and still more rarely succeeds. The effect of a plan generally is to confound a witness, who is not accustomed to documents of that nature. In some

cases, indeed, I have seen such plans shewn to witnesses. But it was competent for the Crown counsel to have shewn the plan to the Fridges, and to have examined them as to its accuracy. For it was produced along with the Defences, and an intimation given of the intention to use it on behalf of the pannel.

LORD MEDWYN.—I concur in thinking that no objection exists to the production of this plan, as a general plan of the *locus delicti*, prepared by a professional surveyor. It is certain, however, that at present it contains much objectionable matter, which cannot be allowed to go to the Jury. Several of the points to which it refers, are confessedly marked, from the information of the pannel himself. Other matters to which it relates are clearly irrelevant, such as the marks of shot upon the trees, from which no inference can be drawn, considering the distance of time at which the examination took place. Neither can the plan afford any evidence of the position in which the pannel was when he fired, because, from the evidence of the Fridges, it appears that they, from whose information the plan has been prepared, had their backs towards him at that time. I think that the whole references should be cut off, and the plan used merely as the surveyor's notes, to assist him in his examination, and to explain his evidence to the Jury. This evidence would no doubt have been entitled to greater weight, if the plan had been shewn to the Fridges. But it is very unlikely that they would have been able to speak as to its correctness.

LORD MEADOWBANK.—I confess that I consider the proposal to let this plan go to the Jury, as involving matter of very great difficulty; and as at present advised, I think it shakes a long established principle in our law of evidence. What a witness has said not on oath, cannot, unless it is a part of the *res gesta*, be received, to contradict the evidence which he gives before us. No principle is better established in the law of Scotland than this; and accordingly, in this very trial, we have found it our duty to reject as inadmissible the account of the transaction

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which one of the parties injured gave to a companion three days afterwards. Now the only evidence that is offered of the spot where the Fridges were, when the different shots were fired, is proof of what they told the surveyor a fortnight ago. Is this not admitting proof of what witnesses have said *ex intervallo?* There may be hardship to parties whose defence requires the production of a plan, in adhering to this rule; but if the law is wrong, let it be altered by competent authority. I cannot think that we are entitled to disregard a principle, which has been fixed by so many precedents. As to what has been said of the plans which are often produced for the prosecution, I have seen objections taken to such plans; and I never before saw a plan of the *locus delicti* produced, in circumstances which gave to evidence taken before the surveyor who prepared the plan, equal weight with that which is given solemnly before the Court, under the sanction of an oath.

In accordance with the opinion of the majority of the Court, the plan was shewn to the witness, and copies of it handed to the Jury—all the references having previously been cut off.

THE WITNESS.—From the place where David Fridge said he stood when the first shot was fired, to the point which he pointed out as where he was when the second shot was fired, the distance is upwards of 100 feet; and there is a steep bank between the two spots. From the spot where Alexander told me he was when the first shot was fired, to where he was when the second shot was fired, the ground also falls. From one of these two spots to the other, by the spot at which Alexander told me he entered the wood, is ninety-three feet. From the spot where they were when the first shot was fired, the ground is level northwards towards Norman Smart's house. If a shot was fired from anywhere to the north of Smart's house, the fall of the ground down to where David was when the second shot was fired, is such that the shots could not take effect. Independently of the intervention of the house, a person standing there would have been invisible to the shooter. Alexander also must, from the spot he pointed out to me, have been invisible to the shooter, at the time the second shot was fired. A shot fired from the north side of Smart's house, if it hit Alexander at the point where he told me he got into the wood, would probably have hit him on the right side, as that side was towards the shooter. From the spot where he heard the

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first shot, to that at which he entered the wood, the wood is on his right side. He would have to turn to the right to get into the wood. The point marked N. on the plan, is the point where Alexander said he was when he heard the first shot; F. is where David heard the first shot. If they were both then with their backs to Smart's house, Alexander would be on the right of David.

Cross-examined by the LORD ADVOCATE, *for the prosecution.*—There is a house at the point marked A. on the plan. The height of this house is 13 feet, of which 5 feet 7 inches is the height of the wall. The ground slopes a little from it to the north. No one firing a shot to the north of that house could have hit a person at F. nor at N., as the house would intervene. But if a person passed by the west end of the house, and fired there, he might have hit one at F or N. There is a bank at the point marked K., which is where Alexander Fridge told me he entered the wood. I. is the spot where the Fridges told me they were, when they first saw the pannel. If a party running down from I. to K. took the fence there,—whether his right or left side, or his back, would be presented to a person firing from the west end of the house, would depend upon whether he took the fence in a straight or a slanting direction. A person running quickly could not afterwards fix the exact spot where he was.

By the COURT.—The Fridges pointed out the spots where they were, as well as they could tell. The bank at the edge of the wood is about two feet in height. There is nothing there to prevent a person running away, continuing to keep his back towards the person from whom he is running. H. is the place where the Fridges said they saw the pannel standing. I saw the impossibility of his hitting them if he fired from that spot. But I never supposed them to mean that he fired when standing there. A party standing at the end of the house might see the head of a man on the bank at K. From I. to K. is nearly a straight line. If the road were level, the curvature in it is not such, as to prevent a person at K. from being seen from I. But the steepness of the road is such, that from I. only the head of a person could be seen at K. I tried this experiment with my assistant, who was with me.

By the LORD ADVOCATE.—From H. to the west end of Smart's house is about 40 feet. A person coming from H. to the west end of the house, could not have taken up a position from which he could see more than the head of a party entering the wood, unless he had run some yards down the road. At N, which is a point about half way from I. to K, he would have seen his whole body.

By M'NEILL.—E. is a point distant 76 feet from the west end of the house. H. is in a corn field. E. is on the road, which goes west, and joins that down which a party running from I. to K. must have gone. The shot which took effect at N. and F, may have been fired from any part of that wood; but not a shot which took effect at K, unless the party who fired moved forward.

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By the COURT.—When I placed my assistant at K, he did not stand on the top of the bank. If he had, I should have seen two feet more of him.

M'NEILL, *to the witness.*—Did you place your assistant at the place which Alexander Fridge pointed out, as that at which he was hit by the second shot?

The COURT held that the effect of allowing this question to be put, would be to endeavour to contradict the evidence of Alexander Fridge, who has sworn that he was *on the bank* when he received the shot, whereas this witness depones that he did not place his assistant *on the bank*. The question was accordingly found incompetent.

FINLAY ROSS, *farmer at Aldie.*—I know David and Alexander Fridge. I remember of their being wounded in September last. I saw them at Fraser, the smith's, and I also visited Alexander about three days after he returned to his father's house. I had some talk with him about his hurt. This was in the forenoon. He came out and walked a part of the road home with me. He gave a reason for not going farther. He said something about not wishing to be seen out.

The LORD ADVOCATE, for the prosecution, objected to the account of this conversation being received in evidence.

M'NEILL, for the pannel, pleaded,—the questions whether he had been out at all within a fortnight after his return home, and specially, whether he had walked part of the way with this witness, were put to Alexander Fridge, and answered in the negative. He was asked also, whether he said to this witness that he was anxious not to be seen out, in order to give him a better claim of damages against the pannel. It must be competent to contradict the statements which he made in answer to these questions.

The LORD ADVOCATE, for the prosecution, answered, —the question cannot affect the merits of the case, and it may appear invidious to object. But it is against the ordinary practice of the Court to allow such a question to be put.

M'NEILL, for the pannel, replied,—no authority or ground in principle is stated for the objection. One of the questions for the Court to consider is, the extent of injury which the party received. Questions have been put by the Public Prosecutor, to prove that he did not feign illness; and it must be competent for the pannel to establish that he did feign illness—and this may be proved out of his own mouth, by proof of what he said to this witness.

LORD MEADOWBANK.—If it is competent for the pannel to prove what one witness said to another, the same proceeding must in every case be competent on the part of the prosecution. If this conversation had been alleged to have been a part of the *res gesta*, the case would have been different.

LORD MEDWYN.—We are not here in a question of damages at the instance of these parties against the pannel. I cannot therefore think, that the question is of any consequence. But, I think, moreover, that it is clearly incompetent, according to principles which are acted upon in this Court every day.

LORD MACKENZIE.—After the form the evidence has taken, I have some doubts on this point. The prosecutor having asked the question, how long the party was confined, may it not be competent for the pannel to establish, that that confinement was purposely prolonged longer than was necessary? It is only in that view of the matter that I have any doubt.

The objection was accordingly sustained.

THE WITNESS.—I saw Alexander Fridge out frequently after he returned to his father's. I saw him out a second time within the fortnight.

By the COURT.—It was not three days after Alexander came back to his father's that he accompanied me on the road. It would be less than eight days—about five, but I do not recollect rightly.

JOHN MACKENZIE, *writer, Tain*.—I am one of the Magistrates of Tain, a Justice of Peace, and a Deputy-Lieutenant of Ross-shire. I heard of the Fridges being wounded. I had known the pannel two years. I knew him to be a humane, and respectable person, and was

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that kind—and far less in defence of game, which in strict law belongs to no one. In no case has any party a right to use weapons of any kind or description—whether lethal or not—to protect his game from any amount of poaching. If, therefore, the pannel in this case, wilfully aimed and fired at these young men, who were trespassing on his ground in pursuit of game, there is no doubt that he acted wilfully, maliciously, and unlawfully, and may be convicted under both or either of the charges contained in the Indictment. His Lordship commented on the evidence at some length, expressing a decided opinion that both shots were proved to have taken effect, and that this circumstance of itself must have considerable effect, in rebutting the defence, that the injury inflicted was unintentional and accidental.

The Jury, by a large majority, found the pannel guilty as libelled, but not with the intention of doing any serious bodily harm.

This verdict having been recorded,—

CRAUFURD, for the pannel, pleaded in arrest of judgment, that the verdict was an acquittal of the statutory charge at least. The intent to do "grievous bodily harm" —though stated by Mr. Alison, (Vol. i. p. 171), not to be required in the clause declaring it capital to discharge, or attempt to discharge loaded fire-arms—is in fact a necessary ingredient in all cases under the second section of the statute. If there is any grammatical stop at all in this section, it is after the words "shoot at any of his Majesty's subjects," yet Mr. Alison excludes the intent from the whole cases where fire-arms are used. Besides, even his doctrine, that "intent is to be inferred" from the use of fire-arms, does not apply to a case like the present, in which the Jury have expressly negatived the intention to do any serious bodily harm. The restriction of the libel by the Lord Advocate cannot alter the legal nature of the crime, and the present question must be decided, as if the prosecutor were asking a capital sentence, which, but for the restriction, the Court must have awarded, if the pannel had

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been convicted of the statutory charge. Now, the statute provides, (§ 4,) "that if it shall appear upon the trial of "any person accused of any of the several offences herein "before enumerated, that under the circumstances of the "case, if death had ensued, the act or acts done would not "have amounted to murder, such person shall not be held "guilty of a capital crime." The verdict establishes, that the pannel in this case could not, if death had ensued, have been indicted for murder. And its effect, therefore, must be, that no judgment can pass on the statutory charge.

LORD MEADOWBANK intimated, that the Court were anxious to have time to consider deliberately the point raised for the pannel.

The diet was accordingly continued till the 5th instant.

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When the Court met on that day—

THE LORD ADVOCATE, for the prosecution, stated, that in the circumstances of this case, he thought himself at liberty to withdraw and pass from the statutory charge against the pannel, leaving the question in regard to the construction of the statute open for future discussion. He accordingly moved for judgment on the common law charge only.

CRAUFURD, for the pannel, argued,—the charge on which judgment is now sought, is that of "wilfully, *maliciously*, and unlawfully discharging loaded fire-arms." *Malice* is of the essence of the offence charged, and a verdict negativing the intention to do any serious bodily harm negatives malice, (Alison, Vol. i. p. 2. Case of *James Gastineaux*, 1786; Leach, Vol. i. p. 417.) The pannel might have been indicted for culpable and reckless firing, which is a known offence; but the crime with which he was charged is negatived by the verdict.

M'NEILL was heard on the same side.

LORD MACKENZIE.—I cannot say I have any doubt that we must repel this objection. The statutory charge has been passed from. But there remains the charge at common law, of "wilfully, maliciously, and unlawfully "discharging loaded fire-arms at any of the lieges, more

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"especially when committed to the serious injury of the "person, and to the effusion of blood." The Jury have found the pannel guilty as libelled, with this important qualification, "but not with the intention of doing any serious bodly harm." If it were true, in language or in law, that there can be no malice without an intention to do *serious* bodily harm—it might be said that the Jury had negatived malice. But there may have been malice on the part of the pannel, even if he intended only to give the parties fired at a violent fright—and still more if his object was to do them a bodily injury of a less kind. I think therefore, that the verdict contains a good conviction of the common law charge.

LORD MEDWYN.—I entirely concur. The Jury have found the pannel guilty of the charge at common law, as libelled. Their verdict is no doubt qualified in an important respect, as regards the punishment which is to follow. But this modification regards only the intent with which the crime was committed—not the effects which followed it—and still less its three essential qualities, that it was done wilfully, maliciously and unlawfully.

LORD MEADOWBANK also expressed his concurrence.

M'NEILL, for the pannel, referred, in mitigation of punishment, to the excellent character which it had been proved he bore.

LORD MACKENZIE.—I think it right to say that her Majesty's Advocate has, in my opinion, acted rightly in withdrawing the statutory charge, since there is at least room for serious doubt, whether it could have been maintained under the verdict, that that charge was proved. That withdrawal makes a material difference in the punishment, even after the restriction of the libel. And in regard to the charge at common law, on which a sentence is to proceed, the qualification adjected by the Jury to their verdict, is very important, because, if it had been proved that the pannel fired with the intention to kill, or to do serious bodily harm, the punishment must have been very different from that which I am about to propose.

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The case therefore I take to be, that he fired at the persons who were trespassing on his property in pursuit of game, with the intention of doing them some slight injury; but the injury which he actually inflicted, was serious. The other circumstances of the case are less favourable. There was no provocation given,—no violence shewn by the parties injured. The shot was fired in the mere anger which sportsmen are apt to feel against parties in that situation. In these circumstances, I attend to the high character which the pannel bears,—not to his station in life, because the higher that is, the more able he ought to be to restrain his passions,—but to his character as a kind, generous, and humane man; and the punishment which I propose, is that of imprisonment for eight months, in the Edinburgh Jail.

LORD MEDWYN.—I concur in the sentence proposed, taking into consideration the qualification appended to the verdict, and the character of the pannel. At the same time, there are circumstances in the case, which render it necessary for us to mark the heinousness of the offence. The parties injured, though they were trespassing at the time, were persons well known to the pannel, as is proved by his sending to the father of one of them to complain. At the time he fired, they were not daring him, but running away. Not one shot only is fired, but two; and it appeared to me quite clear from the evidence, that both took effect. Some injury was certainly intended; a serious injury was done; the pannel's own statement is, that he intended to frighten them by firing over their heads. If this is the object of any party, he ought to be careful how he carries it into effect. In this case it is fortunate for the pannel, that he had fired off the ball with which it appears his gun had been previously loaded, and replaced it with shot. For if he had fired with ball, and the shot had taken effect fatally, the conviction against him must have been one of murder.

LORD MEADOWBANK.—I entirely concur, and I have only to add, that in a recent case, in which the circum-

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stances were very similar to those which have been proved here, the nature of the punishment which ought to follow an offence of this nature, was very deliberately considered by the Court.[1] In that case, there were some aggravations which do not exist here, and accordingly the period of imprisonment was longer.

In respect of the foregoing verdict of Assize, and the minute by the Lord Advocate restricting the punishment, the pannel was sentenced to be imprisoned, in the Tolbooth of Edinburgh, for the period of eight calendar months.

Dec. 19 1838.

Present,

THE LORD JUSTICE-CLERK,

LORDS MEADOWBANK, MACKENZIE, MONCREIFF, MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE—*Lord Advocate Murray—Sol.-Gen. Rutherfurd—Innes.*

AGAINST

BERNARD GREENHUFF and OTHERS—*Robertson—Wilson.*

KEEPING A GAMING-HOUSE.—1. The opening and keeping of a common gaming-house, for the playing of games of chance for money, for the

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[1] His Lordship referred to the case of John Reid, High Court, 20th July 1837. The pannel, who was a gentleman's game-keeper, was charged with contravention of the act 10th Geo. IV., c. 38, § 2, as also with "assault, more especially when committed by discharging loaded "fire-arms to the serious injury of the person, and the effusion of blood "and danger of life," or alternatively with one or other of these crimes; "IN SO FAR AS, on the 4th of April 1837, at or near to Drumshorland "moor, &c., the said John Reid did wickedly and feloniously attack "and assault Peter Kelly, &c., and did, by then and there discharging "a gun or fowling-piece loaded with gun-powder and leaden shot, &c., "wilfully, maliciously, and unlawfully shoot at the said Peter Kelly, and "the said shot, &c., having penetrated and lodged in the person of the "said Peter Kelly, he was thereby severely wounded, to the serious in-

profit of the keepers, and where games of chance are commonly and publicly played for money, found an Indictable offence at common law.

2. A pannel who pleaded guilty to a charge of opening and keeping a gaming-house of the above description in Edinburgh, sentenced to two months imprisonment.

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BERNARD GREENHUFF was brought before the Court on the 18th of July, charged, along with CHARLES STATEN, CHARLES STOCKWELL, and MONNINGTON PARRY, with the crime of opening and keeping [1] mon gaming-house, for the playing of games of cha money, for the profit of the keepers, and where of chance are commonly and publicly played for m

IN SO FAR AS, they did, all and each, or one or more of them, on the 10th of October 1837, within the house in High Terrace of Edinburgh, then occupied by Ann Cameron or Rutherford, and now or lately unoccupied, set up and open, and did, for thirty days or thereby immediately following, keep a common gaming-house for the playing of games of chance, namely *roulette, rouge et noir, hazard, lamerveille*, and other games of chance, for money, for their profit, and where the said games, or one or more of them, were during the said time commonly and publicly played for money, by their desire or permission, by a number of persons frequenting the said gaming-house, in particular by Charles Durie, doctor of medicine, residing in Hamilton place, Stockbridge, near Edinburgh, William Blackwood, Esquire, of Colton, in the parish of Dunfermline, and shire of Fife, William M'Gill, residing in Teviot Row, Edinburgh, and others:

The Court, after some discussion, ordered Informations on the relevancy of the Indictment.

"jury of his person, the effusion of his blood, and danger of his life; "FARTHER, time and place above libelled, the said John Reid did wickedly and feloniously attack and assault William Wilkie, &c., and did, "by then and there discharging a gun or fowling-piece loaded with "gun-powder and leaden shot, &c., wilfully, maliciously, and unlawfully shoot at the said William Wilkie." The pannel, under the advice of his counsel, (*Maitland*) pleaded guilty of the assault upon Peter Kelly as libelled, and proof was led of his having borne a good character for twelve years. He was sentenced by Lords Moncreiff, Medwyn, and Cockburn, to twelve months imprisonment in Jail.

[1] For the previous proceedings against the pannels, under the statutes 12th Geo. II. c. 28, and 18th Geo. II. c. 34, see page 128.

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In the Information for the prosecution, it was argued, —None of the ancient Scotch statutes directed against various sorts of games, meet in any degree the evil which is now sought to be punished and prevented. Those of them which are so constantly met with in the statute-book, prohibiting foot-ball and golf, and the revels of Robin Hood and the Abbot of Unreason, were undoubtedly intended chiefly to prevent the mischief of large assemblages of people in an armed and violent age; though it may also have been imagined, that the use of the bow, in which Scotland was deficient, might be promoted by the prohibition of other more popular exercises. Those statutes had no reference to games of chance, properly so called, and never contemplated the remedy of that class of evils which arise from a passion for gaming. These do not appear to have been noticed by the Legislature, or indeed to have risen to any height in this country, until the union of the kingdoms had communicated to us some of the wealth, and with it some of the vices of the richer nation. Even the feeble effort made in the act 1621, c. 14, had for its object the prevention of only one small division of offences connected with gaming; and attempted to check them with provisions and penalties, which, if at any time effectual, must be admitted to be now wholly inapplicable. That statute was directed against the permission of *occasional* gaming in taverns; and its prohibition was sanctioned by a penalty of L.40 Scots for the first fault, and *loss of their liberties* for the next. It is plain that this last phrase refers not to imprisonment, but to deprivation of burgal privileges, now a punishment totally inapplicable, while the amount of fine for the first offence is equally unsuitable to the present state of society and the value of money. The statutes against gaming past since the Union have been held not to apply to Scotland. The question remains, whether the offence charged against the pannels is of such a nature, and so prejudicial to society, that it comes within the reach of the common law? Or is there any thing in the offence of keeping a common gam-

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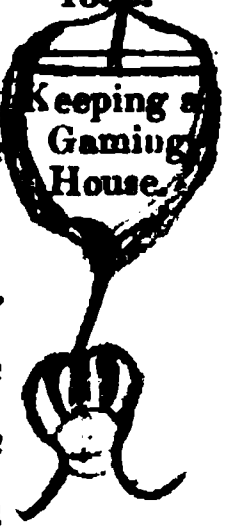

ing-house, peculiar and favourable, which should take it out of the scope of that received maxim of Scotch law, that the Supreme Criminal Court is competent to try every crime and offence?

It has been urged, that the fact of statutes having been enacted against this offence, shows that the Legislature has not considered it an offence at common law. Now, although it may be conceived that this argument is sufficiently answered, when it is shown that no Scotch statute strikes, or was intended to strike, at the particular offence which forms the subject of the present Indictment, it is not to be overlooked, that the passing of a statute, either for facilitating conviction, or defining punishment in certain crimes, or even the existence of an Act of Parliament which has gone into desuetude, or which, from the beginning, has been found ineffectual and abortive, have never been considered to take away the right of prosecuting the several offences at common law. On the contrary, the Court every day sustains Indictments proceeding alternatively on the sanctions of statutes, and on common law, for the same *species facti*; and in many cases, such as in the crimes of forgery, embezzlement of manufactures, assault by cutting and maiming, and others, where either the technicalities of the statute seem to impede the prosecution, or the punishment prescribed appears excessive, it has been frequent in practice to rest indictments on the common law alone—a practice sanctioned by our institutional writers and by the Court, and tending undoubtedly to mitigate the severity of punishments amongst us.

It is not necessary to enlarge on the mischiefs arising from the vice of gaming. It is ingeniously attempted for the pannels to represent it rather as a weak and bad habit than as a crime; and lest this might not be received with favour, it is urged that a multitude of other immoral practices and vices of much higher guilt, and equally prejudicial to society, are allowed to go unpunished.

It is unhappily too true, that much of what is criminal in human conduct does, and must ever go unpunished by

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human laws. The rules and all the machinery of criminal jurisprudence are suited to definite palpable transgressions of the law, and will not be accommodated to the nice and delicate distinctions on which moral right and wrong so frequently turn. This is the reason why many criminal intentions,—many inchoate offences,—many sins of omission,—a life even spent in disregard of the debt owed to our neighbours and to society,—must escape the chastisement of any human laws. But this is surely no reason, why an offence should be passed over, which, while it has a direct tendency to spread and encourage a most mischievous habit, is definite and palpable in its nature, easily described and limited, and not at all impossible to be detected and punished.

Now, with regard to gaming, it cannot be said that its public practice has ever been sanctioned or tolerated in Britain. The denying the right of action on a gaming debt, and the various ineffectual statutes imposing penalties on public gaming, although these last have been found only to apply to England, prove sufficiently the intention of the legislature to treat this as an offence, which may be repressed in criminal, as well as civil courts. But it is incident to this, as well as to some other evils of as mischievous consequences, that the facility of concealment generally sets all legislative or judicial remedies at defiance; and unfortunately, where detection does follow, the penalty falls, in too many cases, upon the comparatively innocent victim, who has perhaps been already sufficiently punished, while the old offender, who would form the proper object of public prosecution, seldom fails to elude discovery.

It would be a waste of time to seek to prove, that such an offence is highly culpable and punishable; but it may be observed, that the charge in the Indictment is fenced in such a manner, that it may be prosecuted, without violating the rules of public expediency, and sustained, without the possibility of being drawn into a dangerous or inconvenient precedent.

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1. Under this Indictment the Prosecutor has to prove, that the pannels kept a *common* or public *house* for play. This excludes all inquisitorial prying into private and domestic conduct, which might lead to greater mischiefs than even the crime which is sought to be repressed. A common gaming-house is not only a source of infinite danger to those who may be seduced to frequent it, but as a nuisance to the neighbourhood, is a proper subject for the interference of the police.

2. To entitle the Prosecutor to a verdict on this Indictment, he must prove that the house was kept for the playing at *games of chance for money*. The term *games of chance* is of too received a meaning to require definition. It certainly saves the Indictment from the force of the objection, that golf, cricket, or other games of exercise, or chess and whist, and such recreations as innocently exercise the memory and judgment, would fall under the same punishment which is here sought to be applied to gambling alone. It cannot be denied that several games combining a certain degree of either skill, or exercise, or both, with chance, are often the means of serious mischief; and that places where such are publicly played, such as common billiard rooms, may frequently come within the scope of a rigorous and vigilant police law. But these are not to the present purpose; and it only tends to embarrass the judgment, to mix up such foreign elements with a question so simple and narrow as the present. It is sufficient here that the Indictment obliges the Prosecutor to prove, that games professedly of pure chance, and for money, none of which can be beneficial, or, when used in excess, innocent, were here permitted to be commonly and publicly played.

3. While, on the one hand, the privacy of domestic life is respected, neither is it sought on the other to interfere with meetings or clubs of persons haunting a house of their own, where, if they be imprudent enough to play together at games of hazard, they are yet presumed to play without unfair advantage, and under the same rules

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of honesty and honour which regulate the conduct of private houses. It is widely different where a professed and professional gamester holds the bank, and sits with all the wary coolness of experience, and intimate knowledge of the game, to take advantage of the rashness and excitement of the novices who are seduced into his society. It is widely different, even if the professed gamester be supposed to play fairly, and with only the advantages which the rules of the game may give in his favour. But if the fair and reasonable presumption be, that the keeper of the gaming-table goes beyond the advantages which coolness, experience, and the rules of the game more than sufficiently afford him,—if we suppose him tempting the beginner with a show of success, furnishing excitements, and even the stimulus of intoxicating drink, to lead him deeper into play, and, after having wound him up to desperation, using not only the skill of the cool calculator, but the tricks of the cheating adept to complete his ruin,—then the difference comes out strongly, between the play of a Private house or a Club-house, and the gambling of a *Hell*. It may be said that such arts and fraud would form an unquestionable ground of indictment, and that they ought not to be put forward hypothetically, when the pannels are not upon their defence against such a charge. The Prosecutor certainly does not hope to prove any such arts under the present Indictment; and perhaps he would not be allowed to do so, since they are not specifically set forth. But although these arts, from their very nature, must be in all cases very difficult to prove, yet as reason and experience show them to be the natural result of the life of the keeper of a gaming-house, they are here brought forward, only to show the propriety of the third requisite in the present prosecution,—namely, that the common gaming-house was kept *for the profit of the keepers*.

In a matter of general polity like the present, it seems not unreasonable to draw an analogy from the practice of England, where, from various causes, the mischief and its remedies have been more pressed upon the attention of the

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Legislature and of the Courts than with us. In that country it has been attempted by repeated acts of Parliament to repress and punish the keeping of common gaming-houses. Owing, however, to having attempted a too precise definition of prohibited games, or in consequence of some other defect in the machinery, or by reason of the ingenuity of the accused, those statutes have for the most part failed in their effect, and are now almost inoperative. The recent prosecutions for this offence in England have accordingly been laid at common law, or founded jointly on the common law and the statutes. Two cases, which have been very fully argued, and solemnly decided, are sufficient to show the present state of the law in England as regards this matter.

The first of these is the case of Dixons (Modern Reports, Case 176, V. 10.) which "was an indictment "against Dixon and his wife, charging, that they *et* "*uterque eorum*, did unjustly and unlawfully, such a day, "*et diversis aliis diebus et vicibus tam antea quam postea*, "keep a common gaming-house, *contra pacem et formam* "*statuti*, &c.; to which indictment the defendants demur-"red." The Court found that "the keeping of a gaming-house "is an offence indictable at common law as a nuisance; "nor will the conclusion of the indictment, *contra formam* "*statuti*, bar the party from supporting the indictment "by common law, supposing it could not be maintained "upon the statute; for, where a statute creates or makes "a thing an offence that was not so before by the com-"mon law, gives a certain penalty, and prescribes a me-"thod for the recovery of it, there the act must be pur-"sued; but it is otherwise of an offence at common law, "for which an act gives a new penalty, or a new remedy; "for there, the remedy at common law shall not be taken "away without negative words."

The other case referred to is that of Rogier and Humphrey, tried in 1823. (1 Barnwell and Cresswell, 272.) "This was an indictment against the defendants; and

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" charged, that they unlawfully did keep and maintain a " certain common Gaming house, and in the said common " Gaming house, for lucre and gain, unlawfully and wil- " fully did cause and procure divers idle and evil disposed " persons to frequent and come to play together, at a cer- " tain unlawful game at cards, called " Rouge et Noir ;" " and in the said common Gaming house unlawfully and " wilfully did permit and suffer the said idle and evil dis- " posed persons to be and remain playing and gaming at the " said unlawful game called Rouge et Noir, for divers " large and excessive sums of money, to the great damage " and common nuisance of all the liege subjects of our Lord " the King." A verdict having been found against the defendants, a motion was made in arrest of judgment, and it was pleaded (1.) that the keeping a common gaming house was not an offence at common law, and (2.) that the game of Rouge et Noir, specially set forth in the indictment, was not one of the games prohibited by the statute. Chief Justice Abbot, in pronouncing the judgment of the Court, said, " I have no doubt that the facts stated in this " indictment constitute an offence at common law. Haw- " kins (P. C. 1, c. 75, § 6,) observes, ' It has been said that " ' common gaming-houses are nuisances in the eyes of " ' the law ;' and then he assigns the reason, viz. that " they tend to produce certain evil consequences, which is " not very different from saying that they are nuisances, " if those consequences are produced. Since his time " many parties have been convicted upon indictments, in " which the keeping of such a house has been charged to be " an offence at common law. If any confirmation of the " authority of Hawkins were wanting, it is to be found in " the enactments of the legislature."—The Chief Justice then referred in succession to the provisions of 25 Geo. II. c. 36, and 9 Ann, c. 14; and concluded, that he had " no doubt that this is an offence at common law." Bayley, Holroyd, and Best, Js. concurred with the Chief Justice. (2. Dowling and Ryland, 431.) Holroyd, J.

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said, " I think the reasons which are given in Haw- " kins for the *dictum* which has been cited, and objected " to, are perfectly satisfactory, and go the full length of " shewing that the offence charged in this indictment, and " proved at the trial, is an offence at common law; and " that the language of the statutes plainly indicates, that " the legislature, in passing them, adopted and acted upon " that idea." Best, J. observed, " I should be extremely " sorry if I thought it possible for any unbiased mind to en- " tertain a doubt upon this subject. It is quite clear that " any practice which has a tendency to injure the public " morals, is a common law offence, and that I take to be the " foundation of the *dictum* to be found in Hawkins. To " me it is equally clear, that the practices charged in this " indictment, and of which these defendants have been " convicted by a jury, have such a tendency, and are there- " fore indictable in the present shape."

It may be stated with confidence, that these decisions have settled the law of England in this matter, beyond doubt or dispute. It would be a strange, and certainly not a desirable state of affairs, if that which is thus held as a grave offence, and severely punished in the one country, should be deemed beyond the reach of punishment in the other. But when it is considered that England, with numerous statutes applicable to the offence, still holds the common law sufficient and effectual for its correction, it cannot but seem an extreme anomaly, if Scotland, with no statutes applicable, shall hold the offence beyond the reach of the common law.

The Prosecutor, in conclusion, would desire to rest his case upon the maxim, that no overt act, deeply injurious to individuals and to society, can be considered as beyond the reach of punishment by the common law of Scotland; but he hopes that it may not be considered irregular, in the absence of all decided cases, to allude to the reported expressions of opinion of two of the judges in advising the previous indictment against these pannels,—both of whom stated, (Swinton, Vol. ii. p. 147) that they supported the

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objection to the statutory charge with less regret, because they had no doubt that the very dangerous offence here charged, the opening and keeping of a common gaming-house, is an indictable offence by the common law of Scotland.

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In the Information for the pannels, it was argued,—(1.) An Indictment at common law is incompetent, in respect there is a Scotch statute standing unrepealed, and in observance, whereby the offence charged is prohibited, and by which statute the punishment of transgressors, of course, falls to be regulated. (2.) There does not exist in Scotland any common law on the subject of the particular offence charged.

(1.) The British statutes against excessive and deceitful gaming having been found not to apply to this country, it is on the law of Scotland alone that the present indictment, if tenable at all, must be maintained. Now, the only Scottish acts, containing prohibitions against gaming, are the following :—

First, there is the act of Parliament 1424, of James I., chapter 17, in the following terms :—" *Item*, It is statute " and the King forbiddis, that na man play at the futeball, " under the paine of fiftie schillings, to be raised to the " lord of the land, als oft as he be tainted, or to the Schi- " reffe of the land, or his ministers, gif the lordis will not " punish sik trespassoures."

Next, there is the act 1457, chap. 64, whereby " it is " decreeted and ordained, that the futeball and golfe be " utterly cryed downe, and not to be used." " And as " tuitching the futeball and the golfe, to be punished by " the baronnis unlaw ; and gif he takis not the unlaw, " that it may be taken by the Kingis officiares."

Again, in the year 1491, another act was passed in these terms :—" *Item*, It is statute and ordained, that in na " place of the realme there be used futeball, golfe, or other " sik unprofitable sports, for the commoun gude of the " realm, and defence thereof, and that bowes and schutting

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"be hanted, and bow-markes maid therefor, ordained in "ilk parochin, under the pain of fourtie shillinges, to be "raised by the schireffe and baillies foresaid."

Farther, by the act 1555, cap. 61.—"It is statute and "ordained, that in all times cumming, na maner of per-"sons be chosen Robert Hude or Little John, Abbot "of Unreason, Queenes of Maii," &c. "And gif onie "women, or uthers about summertrees, sing and makis "perturbation to the Queenis lieges in the passage throw "burrowes, and uthers landward townes, the women per-"turbatoures, for skafrie of money, or utherwise, sall be "taken, handled, and put upon the cuckstules of everie "burgh or towne."

Lastly, there comes, but so far back as the year 1621, the only act to be found in the whole statute law of Scotland, which appears in any degree to bear on the offence and crime charged in the present indictment. It is the act of James the Sixth, 1621, c. 14, the preamble of which is as follows:—"Our Sovereign Lord and Estates of Par-"liament, considering the manifold evils and inconveni-"ences which ensue upon carding, and dycing, and horse-"races, which are now overmuch frequented in this coun-"try, to the great prejudice of the lieges, and because "honest men ought not to expect that any winning had "at any of the games above written, can do them good or "prosper." The act then proceeds, that it is "therefore "statuted and ordained, that no man shall play at cards "nor dyce in any common house, town, hostelrie, or "cooke's houses, under the pain of fortie pounds money "of this realm, to be exacted of the keeper of the said inns "or common house, for the first fault, and loss of their li-"berties for the next." This is the clause that seems most nearly to apply to the present case. The same statute farther goes on to enact, "That it shall not be lawful to "play in any other private man's house, but where the "master of the family playeth himself. And if it shall "happen any man to winne any summes of money at card-

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" ing or dycing attour the sum of a hundred merkes, within " the space of twenty-four hours, or to gain at wagers " upon horse-races, any summe attour the said summe of " an hundred merks, the superplus shall be consigned," &c., " to be employed always upon the poor of the parish, " where such winning shall happen to fall out, to the ef- " fect, that *either* excess in play may be thus restrained, " *or*, at the least, excessive winning may be employed as " said is."

Now, whether the whole of these statutes now referred to be still in observance or not, the pannels will not presume to say; but they find it to be laid down in several authorities, that the one last quoted is still held to be so; (Hutchison, Vol. ii. p. 354; Blair's Manual, p. 108); at all events, it is certain that it was so held in a case that was decided so late as the year 1775—the Kirk-session of Dumfries against the Kirk-session of Kirkcudbright and Kelton. There it was held, on the strength of one of the clauses of the act now quoted, that the kirk-session of the parish, where a horse-race was won, for a wager exceeding 100 merks, was entitled to the superplus for behoof of the poor of the parish. If the other parts of this statute are to be held equally in observance as the clause on which this decision proceeded, then there is no doubt that playing with cards and dice in public houses, is a crime or offence prohibited under a penalty of forty merks Scots. But under the same category, it is equally declared, by the same authority, to be a crime to play at golf or foot-ball—the only difference being that the punishment, in the latter case, is declared to be a fine of fifty shillings, while in the former, it is a fine of forty merks.

According to the statute law of Scotland, therefore, the pannels were entitled to consider, that they were not more guilty or liable to punishment, for opening a house, and permitting persons to play at games of chance with cards and dice there, than are those of the citizens of Edinburgh who daily play at golf on Bruntsfield Links.

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Nay, more, they saw by the same statute, that the penalty was only exigible, when the playing took place in inns or public houses; but that in private houses the playing was perfectly lawful, provided the master of the house joined in the playing. Now it is not alleged in the Indictment, that the playing libelled took place in an inn or public house; on the contrary, it is stated to have taken place in the house of a Mrs. Cameron or Rutherford. This must evidently mean a private house; and as it appears, by the writings produced, that part of the house was subset to the pannels, who thereby came to be in the situation of masters of the house; consequently their joining in the games played, made the playing lawful, under the express words of the Scottish act of Parliament referred to.

(2.) This being the state of the *statute* law of Scotland on the subject of gaming, or keeping a house where games with cards or dice are played, it remains to be inquired, what the common law says upon the point.

None of the ancient authorities notice the matter at all; and the more modern authors refer solely to the Scotch act of 1621 already quoted, and to the British statutes, under which the pannels were formerly indited, as containing the whole law of Scotland on this particular subject.

Thus Lord Bankton, in his Institute, (Vol. i. p. 294,) treating of this subject, says—'By an *old law* the penal-"ty of L.40 was imposed upon the keeper of any common "house or ostelrie where gaming was used at cards or "dice, for the first fault, and loss of liberty for the se-"cond; and if more was won in twenty-four hours than "100 merks, the surplus was to go to the poor. *But* "*now the matter is regulated by British statutes.*" The learned author then gives the substance of the Scotch act 1621, and follows this up by referring to the British statutes already mentioned, as containing the existing law of Scotland on the subject. In this respect it is now settled that this author was mistaken, these British statutes not being applicable to Scotland.

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A similar course is followed by Hutcheson, Tait, Blair, and other modern writers; all of them referring solely to the act 1621, and the British statutes, for the law of Scotland on the subject of gaming and gaming-houses; but none of the great authors, who treat of the criminal law of Scotland, take the slightest notice of the offence at all —neither M'Kenzie, nor Hume, nor Burnet, nor Alison. It appears to be inconceivable that, if the act charged against the pannels be, as stated in this Indictment, by the law of this realm, a crime of a heinous nature, and severely punishable, yet, nevertheless, there is no notice taken of it by the writers on the criminal law, nor the slightest vestige of any trial for the crime ever having taken place, to be found in the records of the Court.

It may be admitted as largely as the prosecutor pleases to state the matter, that gambling is an odious vice, calculated to excite the worst passions of our nature, bringing with it misery and ruin to its victims, and to all connected with them, and frequently terminating in self-destruction. It is easy to paint glowing pictures of its horrors, and this has not been left undone, either by the moralist or the poet. But it will be conceded that many of the vices and offences which beset and degrade humanity, are not matters of criminal accusation, and that many of those offences which cut the deepest into the happiness of others, or bring with them the bitterest pangs, and the greatest degradation to the hapless perpetrator, are beyond the reach of the arm of law, strong though it be. *Filial ingratitude*, wounding the heart and withering the frame of an aged parent; *breach of promise of marriage*, leaving a forsaken girl to drop into an untimely grave; *opium-eating*, withering the faculties, degrading the intellect, and maddening the brain; *the imprisonment without an object* but to wreak vengeance on an honest but unfortunate debtor; *withholding charity*; *sternly refusing to forgive*, and a thousand other acts, positive or negative,—would make a dismal catalogue of the unpunishable offences of which man may be guilty. Be it that gaming, founded

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on avarice, one of the worst of passions, akin to fraud, one of the meanest, is accompanied with no joy to the winner, with sleepless nights to the loser, and that the ruined gamester is often maddened to crime, or seeks refuge by voluntarily rushing into the presence of his offended Maker—the question is, does the common law of Scotland make this a point of dittay, and where is the authority for holding that proposition? The more dangerous the offence, the more prevailing it may be at any particular time, the more desirable it unquestionably is that the offence should be checked. But unless it can be shewn that the common law of Scotland reaches this as a crime for which punishment follows at common law, all this matters nothing. The remedy lies elsewhere. This Court does not legislate. It has no right so to do. It applies existing law to known offences. It does not create new offences, or make new law for old ones. Nor is there any thing of which lawyers ought to entertain a greater jealousy, than the stretching of the common law in criminal matters, beyond the precise boundaries to which it has by custom and practice been limited.

It is not maintained for the prosecution that gaming, or playing at a game of chance, is in itself indictable. In fact, this may, perhaps, be considered as completely innocent, or hardly a moral offence. Four gentlemen may play at whist, without being liable to an indictment, and this although the game may be partly one of chance and partly one of skill. Two gentlemen may play at billiards, and they may do so either for nothing or a thousand guineas a game, without being liable to indictment. Persons may play at rouge et noir, roulette, pitch and toss, dice, golf, cricket, curling, some of which games partake partly of skill, some of which, like dice, depend on chance merely. These games may be played in private, or, as some of them constantly are, may be played in public. The stakes may be high, or they may be low. It would be difficult to show, that a match at cricket for a thousand guineas a side, was one whit more indictable than a match

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at curling for beef and greens, which last act, perhaps, even the Presbytery would not consider ecclesiastically wrong. The man that throws the curling stone, however, in the hope that his party will earn the beef and drink the whisky and water in triumph, commits an act of the same kind, although less in degree, as the man who hazards, at the rouge et noir table, his last franc, the loss of which, perhaps, makes him seek refuge in the Seine. What, then, are the criteria upon which it is said there is here indictable matter?

In the first place, it is said that the offence consists in keeping a common house for play. This, it is said, excludes all inquiry into private and domestic conduct, or, in other words, the act done acquires its criminality from being done in a public-house, while it would not be criminal if done in a private-house. This is really very nice. But even this domestic protection to vice is not all that the prosecutor concedes; for he admits that gaming may be carried on at club-houses, to which members to any number may resort. Now, if publicity as contrasted with domestic privacy—if the keeping of a common house for gambling, as it is called, be the foundation of the offence and of the essence of the crime—what is meant by the distinction which is to give a protection to those whose rank and station heightens their offence, and destroys all sympathy with their evil-doings, while he who plays at a lower stake, appears perhaps in a coarser coat, and expresses his triumph or regret in ruder language, is to be the victim of legal prosecution? Merely to baptise the house by the name of a common house avails nothing. The act done publicly in the one case as well as in the other, must be indictable in both or neither. But the prosecutor feels that he cannot carry his doctrine to the full extent. He cannot indict the members of the New Club in this city, or the club keeper. The mere publicity therefore, of the act, or keeping a house where persons congregate for doing that which is not in itself illegal, does not make the matter indictable, either as against

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those who frequent the house, or those who receive the visitors.

In the next place, it is said that the games are played for the profit of the keeper, and a fine picture is drawn of the conduct, or supposed conduct, of persons who keep such establishments. But nothing of the kind depicted in the Information for the prosecution, is charged in the Indictment. The whole charge is for keeping a common gaming-house, for playing games of chance for money, for the profit of the keeper. It is not said, either in the major or minor proposition, that there was any unfair play, or that there were any inducements, either by drink or otherwise, held out to the visitors to play. The play in itself was perfectly fair; and as to the keepers being adepts at the game, it is not a little singular to charge them thus incidentally with the possession of more skill than their neighbours, when the games are stated as games of *chance*, and when the prosecutor himself contrasts those games with such as whist and others which require skill, and which, on that account, seem to be considered less criminal.

The pannels cannot see either the consistency of this, or why, when rouge et noir is condemned, whist should be protected as a performance of skill. Two persons throwing dice fairly against one another, are certainly less criminal, than an old and wary dowager of rank, who selects a partner at whist equally skilful, and has wonderful success against a young collegian or country cousin. If the prosecutor were to charge unfair play, then an indictment might perhaps be laid for cheating at play. But the pannels stand accused of *fair play*, and the only gravamen of the accusation is, besides the publicity of their conduct, that they have played fairly for profit. Everybody who plays at a game of chance for money, plays in the hope of profit; but no man with a certainty. The very meaning of a game of chance is, that both parties run the risk of profit or loss. They play for loss as well as for profit; and is their crime to be dependent upon the result of a

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game of chance, whether they succeed in getting or losing the stakes? They are not accused of charging admission-money into the house, or of charging anything for the use of the cards, or balls, or counters, which might be a certain profit. They do not admit that this would make their conduct criminal; but it would come nearer the kind of charge of keeping a gaming-house for profit, at which the prosecutor is here pointing. This would make their case more on a footing with the keepers of common billiard-rooms, who charge so much per game, and whose rooms are as open in every city in the empire, as the tavern where the drunkard may get wine, or the druggist's shop, where the poisoner may get arsenic, or other deleterious drug. The case would more resemble the keepers of tennis courts, who also charge for the use of their premises; but the peculiarity here is, that the profit to be made is wholly uncertain, the game being fair, and the keeper being as apt to lose as his visitor.

If then, these criteria be insufficient to constitute this a crime in itself, the pannels would humbly ask, where is the common law by which they are to be reached? Billiard-rooms and tennis-courts, common houses where games of chance are constantly played for the profit of the keepers, have existed without challenge. Club houses, where gambling is publicly carried on, have remained unmolested; and no common law has ever been put in force against these immoralities. The present offence is either of the same character and description with those, or it is totally new and unknown to the manners and customs of Scotland. If it be of the same category of offences as those which have already existed, and which lead to the dismal consequences depicted by the public prosecutor, how has the common law reached them? There has been no prosecution. There is no mention of any such crime or offence in any of our criminal law books. There is nothing to constitute any practice of putting down such institutions, which are as notorious as the golfing society or the curling club. There is not a single case stated even of police interference with anything of the kind.

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But if it be said, on the other hand, that this offence is totally new, then where is the common law that can reach it? Common law is the creature of consuetude It is public—ever active—clearly known. It is not a latent power to be drawn from remote sources, as a new offence starts into existence. The pannels desire not to be misunderstood. They do not say that if an old offence, which the law had been in the habit of repressing, should take a new form, that this would afford any protection to the offender. It would be a bad defence in the case of murder, that it was committed upon the principles of Burking, or by means of the infernal machine. But the answer would be, that the crime was well known at common law, although the form and manner of doing the deed was new. In like manner, if here there had been a consuetudinary law against billiard-rooms or tennis-courts, or the like, it would have been a bad defence that the games were not played with cues or rackets, but with cards and whirling balls. There is no common law in our books or practice, however, against this category of offences. There lies the distinction. The statute law, passed since the Union, has been found not to extend to Scotland. The old Scotch statutes are said to be inapplicable and inoperative. If then the evil be clamant, and if the offence be new, let the legislature interpose; but it would be an evil of tenfold greater magnitude in a free country, that the Judges should assume a legislative power, and stretch forth their hands under the colour of what is called common law, to check an offence of a character and description entirely new, by supporting a charge for which our criminal annals afford no authority.

Finally, the prosecutor has referred to various cases in the law of England, in order to show, that independent of statute, the offence of keeping a gaming-house is indictable at common law in that country as a nuisance. It is said that it would be extremely anomalous, that this offence should be punishable in England at common law, and not so in Scotland. It is not one whit more anomalous, than

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that the statutes passed by the British Parliament on this very subject should extend to England, and not to Scotland, as the Court have already decided. But this English principle and practice of indictment as matter of nuisance, which extends to roads being in bad repair, and the like, is a form wholly unknown in the law of Scotland; and if the offence is new in Scotland, whereas it is of old existence in England, it does not seem strange that the cousuetudinary law of the one country should apply, and not that of the other, where no custom could have existed. But the charge contained in the Indictment in the case of Rogier and Humphry, on which the prosecutor chiefly relies, is, that the defendants unlawfully did keep and maintain a certain common gaming-house, and in the said common gaming-house, "for lucre and gain, "unlawfully and wilfully did *cause and procure divers* "*idle and evil disposed persons* to frequent and come to "play together at a certain unlawful game of cards, "called 'rouge et noir;' and, in the said common gaming-"house, unlawfully and *wilfully did permit* and suffer "the *said idle and evil disposed persons* to be and remain "playing and gaming at the said unlawful game called "'rouge et noir,' for divers *large and excessive sums of* "*money*, to the great damage and *common nuisance* of all "the liege subjects of our Lord the King." (1. Barnwell and Cresswell, p. 272.)—Now, the charge here plainly amounted to a breach of the peace. The parties are accused of causing and procuring divers idle and evil disposed persons to frequent their gambling-house, and there to be and remain, for the purpose of playing at unlawful games, for large and excessive sums of money, to the great nuisance and common damage of the liege subjects. The pannels are not accused of procuring any persons—far less idle and evil disposed persons—to frequent their house; and the only three individuals named in the Indictment are a doctor of medicine, a landed gentleman, and another individual residing in Edinburgh. Neither are they accused of playing games for large and excessive sums of

money, which, in the case already mentioned, is treated as essential to the existence of the offence. The Indictment here, and the offence charged, is of a very different complexion; and the congregating of evil disposed persons, either for gambling, or for politics, or for refreshment, or any other purpose, may amount to a breach of the peace, which is a known offence by the common law of Scotland, as much as by the common law of England. It is, therefore, enough upon this subject to say, that no such offence is charged here; and the pannels are entitled to maintain, that the prosecutor would have so charged the matter, had he imagined that any such offence had been committed. In any view, they must protest against the common law of Scotland, in criminal matters, receiving any aid from the analogy of the common law of England, which can form no part of the consuetudinary law of Scotland; and with whose analogies—imperfectly, as Scotch lawyers are presumed to know them—we are often apt to be misled.

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The case came to be advised this day, when the following opinions were delivered:—

The LORD JUSTICE-CLERK.—In reference to the case of the pannel now at the bar, and others, it will be in the recollection of the Court, that they were at first indicted on certain statutes which were found not to apply to Scotland. Her Majesty's Advocate has since thought it his duty to raise against them an Indictment at common law, for the crime of "opening and keeping a common "gaming-house, for the playing of games of chance for "money, for the profit of the keepers, and where games "of chance are commonly and publicly played for money." Informations were ordered on the relevancy of the charge so laid; and on considering these Informations, with all the attention which I have been able to bestow, I have come to be decidedly of opinion, that this is a relevant charge by the common law of Scotland. It

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does not appear to me to be a matter of any signification in the present question, that we have found that the statutes formerly libelled on do not extend to Scotland. For, in innumerable instances in this Court, charges have been found irrelevant under statutes, and yet relevant at common law. In determining whether or not what is here charged is a crime, we are bound to consider what the nature of a common gambling-house, of the description set forth in this Indictment, is,—what are its effects,—and what its consequences to the public at large. Now, it appears to me, that an establishment of the nature here described, the doors of which are open at all times to the young and to the thoughtless, is necessarily productive of the greatest evil, and must tend to the corruption, not only of individual, but of public morals. And when I call to mind the disgraceful scenes which take place in some of the streets of London, and at the Palais Royal in Paris, I have no hesitation in saying, that the attempt to carry on an establishment of this description within this city, is so great an invasion of the rights of public morality, and threatens such serious evils to the public at large, and to the particular community among whom it is sought to be introduced, as to be clearly cognisable by this Court. I cannot better express the opinion which I entertain, as to the inherent powers of the common law to repress an evil of so great magnitude, than in the words of Lord Wynford, (then Mr. Justice Best,) in one of the cases which has been quoted in the Information for the Public Prosecutor :—" It is quite clear," says that learned Judge, " that any practice which has a tendency to injure the " public morals is a common law offence." It is important to observe, that in this case, the English Judges were unanimous in holding, that the keeping of a common gaming-house was an offence at common law, and that although there existed various statutes applicable to the subject. Now, I have no hesitation in saying, that in a question of this nature the analogies of the law of England, and the *dicta* of the Judges of that country, are entitled

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to very considerable weight. I certainly admit, however, that the more proper inquiry for us is, whether the offence charged in this Indictment is cognisable by the common law of Scotland? I have looked into the authorities on this subject, and I have found enough to satisfy my mind, that there are solid principles in our law to justify a charge of this nature. It is of no consequence that the charge is now made for the first time. For there are numerous instances, in which crimes which had never before been the subject of prosecution, have been found cognisable by the common law of this country. On this point I refer particularly to the authority of Baron Hume. (Vol. i. p. 12.) It appears that that learned author had not been sufficiently aware of the power of the common law in England; for after stating, that "It seems to be held in Eng-"land that no Court has power to take cognisance of any "new offence, although highly pernicious, and approach-"ing very nearly to others which have been prohibited, "until some statute has declared it to be a crime, and as-"signed a punishment," he continues—"With us the "maxim is directly the reverse; that our Supreme Cri-"minal Court have an inherent power, as such, compe-"tently to punish (with the exception of life and limb) "every act which is obviously of a criminal nature, though "it be such which in time past has never been the subject "of prosecution." Now, the present case is just one of those, in which this course is attended with one of the advantages pointed out by Baron Hume, namely, that "the "evil is repressed in its beginnings." For I never was aware of the existence in Edinburgh of a public gaming-house, in which games of chance were commonly played for money, for the profit of the keepers of such house. If illustrations were necessary of the principle laid down by Baron Hume, they are afforded by various other parts of his work. But if any particular instances are required, in which this Court has exercised the power inherent in it, according to this high authority, I would refer to the law in regard to combinations of workmen. We all know that

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an Indictment for this offence was brought before the Court in 1808, when the Judges were equally divided as to its relevancy. (Case of James Taylor and others, 19th October 1808.) A report of that case is given by Mr. Burnett (Appendix, No. 10); but after his death it was solemnly adjudged, after the fullest consideration, that the charge was relevant, although no institutional writer had ever alluded to it.[1] And the principle of that decision was, that this Court

[1] The third edition of Hutcheson's Justice of the Peace, Appendix III. No. 16, contains a full report of the opinions of the Judges in the case of Taylor and others, which is believed to have been revised by their Lordships. Lords Craig, Cullen, and Hermand, thought the Indictment irrelevant; the Lord Justice-Clerk, (Hope) and Lords Armadale and Meadowbank were of an opposite opinion. But in consequence of the head of the Court having no vote, the decision was against the relevancy. The next case in which the question was raised, was that of Chalmers Macdonald and others, journeymen shoemakers, (11th January, and 22d May 1811.) The information for the prosecution, in this case, was drawn by the present Lord Mackenzie, then one of the Advocate-Deputes; and that for the pannels, by the present Lord Cockburn. In the former it was admitted, that there was no statute, or custom, in support of the charge brought against the pannels, but argued that it was certain, "and very far past all disputing, that a crime may be constituted by the law of Scotland, without either the one or the other." The essentials of a crime were farther stated to be the following: 1st, "It must be an act of a nature mischievous to society. 2nd, The mischief must not be very remote or recondite, but such as ordinary men, "if anxious to avoid injury to others, will abstain from. 3d, It must be "such an act as can practically, and without inexpediency, be restrained "by punishment, not one of these innumerable bad actions, those violations of *imperfect* obligations, or duties which are beyond the reach "of law, because to punish them would cause more evil than to permit "them, and which must be left to the sanctions of morality and religion." In the information for the pannels, it was admitted, "that crimes can be "declared by the Court without statute," or in other words, "that "what is criminal can be declared by the Court to be a crime." But it was denied that the Court had any "power to *make* any facts it pleases "criminal," and the tests by which it was proposed on the part of the prosecution, to fix the essentials of a crime, were objected to as wholly inadequate. An interlocutor was pronounced by the Lord Justice-Clerk, (Hope), and Lords Craig, Armadale, Meadowbank, and Hermand, finding "that though relevant matter might be

has a power to declare any thing that has a tendency to corrupt public morals, and injure the interests of society, an indictable offence. I feel quite certain that the Court

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"selected from the charges made in the Indictment to infer criminal "punishment, they stand too complicated and embarrassed in the "detailed statement of them there, to afford that clearness, precision, "and simplicity, which is suited for criminal accusation and jury trial." Baron Hume observes, (Vol. i. p. 495,) that "the terms of this interlo- "cutor were such as gave reason to believe that, on a libel not subject "to the same special exceptions, the Bench might be disposed to de- "part from the precedent in the case of Taylor." Accordingly, two years afterwards, (March 12, 1813,) William Mackimmie and others were charged with illegal combination or conspiracy among a great number of workmen, to compel an increase of wages, by striking work, and other similar means. . The having recourse to acts of violence and extortion to forward the conspiracy, was stated as an aggravation only. Yet no objection was taken to the relevancy of the charge by the very able counsel (Messrs. Jeffrey, J. A. Murray, and Keay) who conducted the defence. And two other cases of a similar nature occurred during the same year, in both of which convictions were obtained. (Arthur Ferrier, 16th March, and John Wilson and David Ross, 18th March 1813; Hume, Vol. i. p. 496.) The last case which it is necessary to notice, is that of John Folhouse Wilson and Charles Banks, 10th January and 20th May 1818. (Hume, Ib.) The charge in the major proposition of the indictment was that of "illegal combination or con- "spiracy; and particularly, illegal combination and conspiracy among "a great number of workmen or artificers, for the purpose of compel- "ling their masters or employers to raise their wages, or the prices of "their work or labour, by imposing upon their masters or employers, "and upon other workmen or artificers, arbitrary and illegal rules and "regulations, by striking work, or threatening to strike work in a body "or in great numbers, at one or nearly at one and the same time, by "subscribing and collecting money for promoting the purposes of such "illegal combination or conspiracy, by administering or taking oaths "for the purpose aforesaid, binding or purporting to bind those taking "the same to secrecy." Informations were ordered on the relevancy of the indictment; and these pannels also had the benefit of being defended by the present Lord Cockburn. But the Court, by a majority, consisting of the Lord Justice-Clerk (Boyle), and Lords Gillies, Pitmilly, and Reston, found the indictment relevant. Even Lord Hermand, who stood alone in the minority, did not doubt the inherent power of the Court to reach a new crime; but founded his opinion on the doctrine, that the facts charged were not of a criminal nature, and on the maxim, "*cogitationis pœnam nemo luit.*"

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has no desire to stretch this power beyond its necessary limits. But when I look at the consequences which would result from our refusing to interfere in this case,—when I consider that this city may be made the receptacle of all the keepers of gambling-houses, who find they cannot pursue their dangerous practices in England without being brought under the correction of the law, I cannot help rejoicing that we have the power to prevent so great an evil. In the Information for the pannels certain cases have been put, as to the impossibility of repressing gaming in private houses, or in club-houses; and reference has been made to a particular club in this city. Now, it appears to me, that there is no parallel between that institution and the house in the High Terrace, which is referred to in the Indictment. I have no idea of there existing there tables where games of the kind stated to have been practised in this public gaming-house, are commonly and publicly played for money, for the profit of the club-master or of the club. I am certain that such a practice, or any thing resembling it, would receive no countenance from the members generally; and if it did, and if others besides members of the club were admitted for the purpose of playing, and a profit made by the members or keeper of the club-house—then, I say, that the Public Prosecutor would have a right to interfere, to prevent a practice which would be highly injurious to public morals. On the whole, I am of opinion that this Indictment must be found relevant, and that any other decision would have the effect of entailing on the country a nuisance, the extent of which is incalculable.

LORD MEADOWBANK.—I cannot say that I have arrived at the opinion which I have formed in this case without difficulty; but it now concurs with that which has been delivered by the Lord Justice-Clerk. I agree with his Lordship as to the inherent power of this Court to repress whatever are, by the law of God, and the laws of morality, *mala in se*. That the Court has always possessed such a power, has been more than once distinctly

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enunciated by our predecessors on this Bench; and the matter is not now open for consideration or discussion. The Lord Justice-Clerk has alluded to a class of cases in which this principle was recognised, those, namely, regarding combinations of workmen. I may refer to another case in which also it was acknowledged and acted upon—that of Rachael Wright, who was convicted of *plagium* or child-stealing, at Glasgow, in Autumn 1808, and the case certified to the High Court, where sentence was passed on the 25th January 1809. There had only occurred one previous case at all in point, and that was mixed up with a charge of murder; but Lord Armadale, Lord Meadowbank, and the head of the Court concurred in holding, that though there had never been a case of *plagium* before, they would have had no difficulty in finding it a capital crime.[1] In regard to the case of combinations, there never was a case more maturely considered. Whether the ultimate judgment to which the Court came was right or wrong, it is not for us now to enquire. We are to take the law as it has been handed down to us. And whatever individual opinions may be entertained, as to the propriety of there being vested in any Court that power which this Court has been found to possess, I do not think that any decision ought now to be given, which will have the effect of altering the law, so clearly and so finally, be-

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[1] See the notice of this case in Hume, Vol. i. p. 84, and Burnett, p. 134. In Mr. Burnett's Appendix, No. 7, the opinions of the Judges are reported at some length. From these opinions, and especially that of the Lord Justice-Clerk (Hope), it would appear doubtful whether the observation of Baron Hume, (Vol. i. p. 12,) that the Court has an inherent power, "competently to punish *(with the exception of life and* "*limb)* every act which is obviously of a criminal nature," is not unnecessarily qualified. His Lordship stated that he differed "from Mr. "Hume, so far as he seems to think that there is not in this Court, either "originally or by usage, the power to punish new crimes capitally, ac- "cording to the nature of the offence: he has given no authority for "this *dictum*. And it seems to follow, that if the Court have an inhe- "rent power to repress crimes, it must have the power to repress them, "by imposing an adequate punishment." Burnett, App. p. 30.

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cause so deliberately settled. In regard to the question before us, the opinion which I have formed is quite conclusive, as to the practices which are charged against the pannels being *mala in se*. That gaming is an offence, by the law of Scotland, is proved by the fact, that gaming debts are not recoverable in any Court. But if there were any doubt on this point, where can we look for confirmation of any thing which is uncertain in our own practice, except to the law of England? A distinction is to be drawn in this matter between statutory and common law. A statute may, from particular circumstances, make a certain act criminal which is not a *malum in se*. But the case is different with regard to common law. Religion is a part of the common law of England. Morality is a part of the common law of England. Our common law is based on the same foundations. If, therefore, keeping a common gaming house of the nature described in this Indictment, is contrary to religion and morality—if an establishment of that kind is a *malum in se*, it must be an indictable offence by our common law, in the same way as it has been found to be by the common law of England. I am quite clear that before a conviction can take place, all the requisites contained in the Indictment must be shewn to exist. But as the charge is laid, I cannot, for the reasons I have stated, hesitate in holding that the Indictment is relevant.

Lord Moncreiff.—I certainly am in the situation of Lord Meadowbank, in this respect, that I have felt considerable difficulty in making up my mind on the present case. But I concur with him in thinking, that the matter which is here charged is, by the common law of Scotland, an indictable offence, and that it is relevantly charged in the Indictment. We are all agreed, that the present case is the first example of an offence of this nature having been made the subject of an Indictment in this Court. But that will go but a very little way to settle the question, unless we were also agreed, that that circumstance must be sufficient to render it incompetent for the public

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prosecutor so to proceed against it. Now it cannot, in my apprehension, be maintained, that nothing is an indictable offence by the common law of Scotland, which has not been indicted before. Indeed, to hold this to be the law, seems to me to be impossible, without running the whole theory of the criminal system into absurdity. For the common law itself must have had a beginning. On the other hand, I think, that the general principle stated by Baron Hume, (Vol. i. p. 12), cannot be disputed, that this Court has power to punish "every act which is obviously of a "criminal nature, though it be such which in time past "has never been the subject of prosecution." There may be, and there have been differences of opinion, as to the extent of this principle, or its application in particular cases. But the principle itself is indisputable, and has been frequently acknowledged by judgments of the Court. I should be unwilling to found much on the Combination cases, because there was a difference of opinion in the Court, and because the law on the subject was soon afterwards entirely superseded; though the determination still is a judgment of the Court on the principle. But Mr. Hume refers to another case, in regard to which there can be no difference of opinion, in which a person accused of sending threatening letters was, without there being any precedent in point, sentenced to transportation. That case had occurred before in England, and they had been under the necessity, in that country, of passing statutes to repress the crime. The *statutes* were found, as in the present case, *not to apply to Scotland.* But the Court, so long ago as 1737, seem to have had no difficulty in finding that the offence could be reached by the native vigour of the common law, (case of James Gray, Hume, Vol. i. p. 441.) Various other cases are to be found in the books, such as the *crimen plagii* and others, all of which establish the same principle, namely, that every act of a criminal nature may be made the subject of Indictment. Taking this, therefore, to be clear, in general, and guarding myself against being supposed to go quite

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as far in the application of the principle, as perhaps some of the Court may, and expressing my conviction at the same time, that we are quite unanimous in desiring that the power of the Court should never be stretched beyond its proper limits, I must come to the consideration of the present case, on the assumption, that what I have stated is a principle of our common law, if we have a common law at all. In regard, then, to the particular act charged in this Indictment, the question comes to be, is it criminal, as being *malum in se*, a thing that is of evil consequence to the public morals and safety, and which tends directly to the disturbance of the peace of the community? And here it is material to observe, that the common law of England, though perhaps of greater force than Baron Hume thought when he wrote his Introduction, has never been supposed to be stronger, or more comprehensive than the common law of Scotland. Yet we find it decided in the case of Dixons, that "the keeping of a gaming house is an offence indictable at common law." And in the other case referred to in the Information for the prosecution, the same doctrine is affirmed by the unanimous opinion of all the Judges. Now, how did they get that doctrine? Mr. Sergeant Hawkins could not, by putting it into his book, make that to be within the power of the Court, which was not so previously; and it is difficult to see upon what his *dictum* could be founded, unless upon the principle suggested by Mr. Justice Best, "that "any practice which has a tendency to injure the pub- "lic morals, is a common law offence." If, therefore, it can be established, that the keeping a gaming house of the nature described in the Indictment is necessarily, and undoubtedly, *malum in se*, it must be an indictable crime. There can be no doubt, that gaming to excess, at games of chance, and for money, is a *public evil*. Such things may indeed be done in circumstances which the law cannot reach. But that in itself it is an evil, is very clear. In the Information for the pannels, it is admitted, "that gambling is *an odious vice, calculated to ex-*

"*cite the worst passions of our nature, bringing with it* "*misery and ruin to its victims, and to all connected with* "*them, and frequently terminating in self-destruction.*" It is also a practice which, as Lord Meadowbank has observed, has always been considered by our law as illegal in some respects, in so far as no action lies for recovery of a game debt. But, because there are many things which are known vices, and injurious to society, which yet the law cannot reach, the prisoners argue the matter in this way: They say, that there are many other things which are in their own nature in the highest degree vicious, and which yet are not indictable, and they give various examples in illustration of their argument, of breaches of the laws of religion and morality, which the law has never attempted to reach. They might have mentioned other cases, such as acts of irregularity in the intercourse of the sexes, drunkenness, and the like. But reference to matters of this nature is no answer to a charge like that in this Indictment. These are cases, no doubt, in which the laws of God, and the laws of morality, are directly violated. But the question here is, whether it be not an indictable offence *to set up a public house* for the *inducement* of parties to commit the particular immoral and mischievous acts here in question. If a house is set up for the open and avowed purpose of enticing young women to their ruin, can it be doubted that the parties so offending might be prosecuted criminally? And what is the charge before us, but that of opening and keeping a common gaming house, for the purpose of corrupting the morals of the community—for the purpose of *enticing unwary persons to their ruin*, by vicious and illegal practices—for the purpose of destroying the peace of families—and for the purpose of introducing the innumerable evils which must follow from such an establishment? It would be with infinite regret, that I should find that this Court had not power to repress so glaring an evil. It may be, that common gaming houses of this kind have been set up before in this city;—although I do not

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know, and it does not appear, that this is the fact. But what we must proceed upon is, that the evil, if it has existed before, has been growing, and has increased, and has assumed such an appearance that the prosecutor now thinks it his duty to bring it before the Court. I have already said, that it has not been without hesitation, that I have come to be of opinion, that we can declare that to be a crime which is new in practice, and which is not mentioned by any of the Institutional writers on the criminal law. But for the reasons which I have stated, I have arrived at the conclusion, that, from the nature and tendencies of the offence charged, it is one which the common law has the power of repressing.

LORD MACKENZIE.—I too have felt some doubt in this case. I have, however, come to be of the same opinion as that which has been expressed by the rest of the Court. I cannot discard the power which is inherent in our common law, to punish every act which is obviously of a criminal nature. It is too late for me to entertain any doubts, that we must sustain a jurisdiction of this nature, as inherent in this Court. There are no doubt limitations within which that jurisdiction must be exercised. We are not, I think, bound to say, that an act is punishable as a crime, merely because it may be stated to belong to a class which may be made out, by refined process of speculative reasoning, to be noxious to society. It is the province of the Legislature to prevent the commission of acts of this nature, by laws promulgated beforehand. In order to bring any act within the jurisdiction of this Court, as a crime, I think the act must either in itself be so grossly immoral and mischievous on the face of it, that no man can fairly be ignorant of its nature, or it must have been settled by a course of experience, and become notorious, that such is its nature. The case of sending threatening letters, appears to me to come within the first category. I think that was one of the cases in which the act committed was such, that if it had never occurred before, no man could doubt the wickedness and mischief, the

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moment it was mentioned to him. In this case, I am not sure that the nature of the offence is so grossly apparent at first. But if at first sight there appears to be any difficulty here, that difficulty has been removed by experience, and the general understanding which has long prevailed, that a gaming-house is immoral and mischievous to the public. I consider the decisions in England as of great value on this point. They find a gaming-house criminal at common law as a public nuisance. I can put no other construction on the term nuisance, so used, than this—that such haunts were notoriously nexious to society in England. Can we doubt that they are equally so in Scotland? I think we too are bound to find them criminal under our common law, for the same reason which substantially guided the English Judges, namely, that the offence charged in the Indictment is not only a *malum in se*, but an evil that now at least—whatever it may once have been—is, in the language of Baron Hume, "of a na-"ture obviously criminal."

LORD MEDWYN.—I cannot say that I have experienced the same difficulty in making up my mind upon this case, as has been expressed by some of the Court. This is an Indictment, not for gambling, but for "opening and keep-"ing a common gaming-house, for the playing of games "of chance for money, for the profit of the keepers, and "where games of chance are commonly and publicly "played for money." Whether this be the first instance of a house of this kind being established in this place, I cannot say; but I believe that it is the first time that a charge of this nature has been brought before the Court by the Public Prosecutor. If it could be held, that when a new offence occurs, this Court has not power to punish what is acknowledged to be a crime, then this offence must remain unrepressed and unpunished; and we would only have to lament, that such offences could only be checked by the tardy operation of legislative enactment, while the first transgressors would remain unpunished. But the reverse is the doctrine of our law; so that when any new

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offence, which is in itself a wrong, and is hurtful to the persons and properties of others, arises from the altered manners or increasing corruption of the age, though altogether unknown in former times, it will become, through the force of our common law, the object of punishment. This may be shewn in a great variety of instances. The case of sending threatening letters has been alluded to, as one in which an act evidently criminal was, for the first time, and without any precedent or legislative enactment, made the subject of prosecution. But there have occurred many other cases, which appear to me to illustrate equally forcibly the vigour of our common law. I may mention the crimes of housebreaking with intent to steal,—the vending of forged notes to an accomplice,—the offence of carrying off a delegate,—all of which have been found indictable at common law. Nay, further, although the old statutes against blasphemy have been repealed, the common law has been considered sufficiently vigorous to punish this offence. (Alison, Vol. i. p. 643.) I do not think that after all these cases, it can be doubted that this Court has an inherent power to punish whatever is in itself a crime. I agree in thinking that this is a power which we should exercise with due caution, and only in cases where the criminal act complained of partakes of the character of a public nuisance, which means, as Lord Mackenzie very properly observed, what is pernicious to society, proved to be so by invariable experience, wherever there has been room for experience. Now that the offence here charged is of a tendency which obviously brings it under this description, that it affects the public welfare, and is a matter of general concernment, I think cannot be questioned. The preamble of the act 1621, states, that manifold evils and inconveniences arise from carding and dycing, to the great prejudice of the lieges; and no one can doubt that a public gambling-house is injurious to society in the highest degree. Its evils are well characterised in the Information for the pannels. And if we look for illustration to the law of England, we have the

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satisfaction of finding, that the decision to which the Court is about to come, is consistent with the principles which have been adopted in that country.

LORD COCKBURN.—I am sorry to find that I have the misfortune to differ from all your Lordships. Since I do so, there is every probability that I am wrong. But as an anxious attention to every thing that your Lordships have stated has not convinced me, the solitude of my position only makes it the more necessary that I should explain the grounds of my opinion.

The Indictment does not charge that there was any *cheating* in the mode of conducting the games, or any other fraudulent practice in the establishment; nor does it aver that it was carried on to the alarm, disturbance, or nuisance of the neighbourhood. It is merely said that the pannels kept a *common* gaming-house, where games of *chance* were played for *money*, and for *their profit*. We are bound to suppose, therefore, that the games were fair, and fairly played, and that there was no offence to the vicinity. If a respectable man were to open a room, where backgammon or billiards could be played, on paying sixpence to the person who supplied the materials, then, *merely* on these facts, this Indictment might be laid.

Now, agreeing as I do, with all of your Lordships as to the possible tendency of such places of resort, I have not been able to bring them within the operation of our common criminal law, so as to be indictable, without any statute or judicial precedent, in this Court.

There was perhaps a time in the history of this country, as there probably has been in the progress of all countries, in which Courts were apt, or rather were obliged, to proceed in the declaration of crimes, upon nothing better than their own views of expediency. When the proper departments of the legislative and judicial powers are unsettled, and urgent evils require speedy remedies, and Courts have little else to direct them than instinctive feelings of morality,—this last ground for the interference of the judicial authority is made reasonable by being neces-

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sary. Courts are compelled to do whatever appears just and useful; and this is justified by being ascribed to the law of nature—the only light that they then have.

But there is a subsequent period in which this primitive state of things is changed. The limits of Courts and of Parliament become defined;—experience has brought out offences;—Courts have not only decided what shall be held to be criminal, but have established general principles to include new forms of delicts;—and the public, in the case of any totally original criminal invention, is adequately protected by the legislature. After this, Courts must proceed upon the precedents or the principles which the long, regular, practice of the law has introduced; and they are attempting a task for which they are ill calculated, and were never intended, when they are extracting new offences out of speculations of their own upon mere public expediency.

No example of the occasional effect of this can be more admonitory, than what is afforded by the case which occurred here not very long ago, when simple combination by workmen to raise wages, was, for the first time, made the subject of indictment at common law. No case was ever disposed of by any Court with greater deliberation; and I am not questioning the legality of the result. But the fact is, that there being no precedent, or any other direct and conclusive authority, the relevancy of the charge was discussed and sustained, solely on the ground that the act was criminal, *because it was dangerous*. There was no other idea or view taken of the case on the Bench. Yet in the course of a very few years it was determined, as deliberately, by Parliament, that this was not only not dangerous, but that it might be meritorious, and was often necessary; and these concerts, instead of being kept under the ban, are now placed under the positive protection, of the law. These unseemly discrepancies between the wisdom of Judges and the wisdom of Senators, will always be occurring, where Courts, instead of walking upon strictly judicial principles or precedents, forestall the remedial su-

perintendence of the legislature, by yielding to the temptation which good minds must always feel, to avert supposed public inexpediency, or to punish clear moral delinquency, by peremptory visitation, on their very first appearance.

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In considering, therefore, in a correct legal age, whether any given act be an indictable offence, I am disposed to look narrowly at what the Courts of law have done, and not at what I may think that Parliament ought to do. Now how does the fact stand in the practice of the law of Scotland, or in the feeling, as evinced by their judicial conduct, of those whose duty it has been to enforce it, on the subject of gaming? Gambling, and in common gaming-houses, is no modern vice. The gaming, in which the main iniquity consists, is condemned, even in private houses, by Scotch statutes above two centuries old; and its evil tendencies are not greater now than they have always been. I can acknowledge no material distinction in the alleged modern peculiarities, that the house is common, and the playing for the keeper's behoof. I do not admit that either of these is new. I believe the reverse. But, at any rate, it is the *gaming* that constitutes the vice, and therefore the danger. If it were not for the gaming, the publicity of the house, and the profit made by its keeper, would be immaterial. Now, if the evil consequences of this practice be so great and so plain, as to be clear even to the eye of the common law, we should have expected the common law to have been put in force against them, so soon as the statutes became useless. So far from this, however, it is admitted that there is not only no judgment, but no *case*. No public prosecutor, though it be his special duty to protect the public morals, has ever charged this as an offence. The record of this Court is an entire blank on the subject. Nor is there any mention of such an offence in any legal work. Not one of our institutional writers, though gathering together every crime, in order that the whole penal code might be known to the

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people in all its details, ever allude to it as a common law offence. There is not a trace of it anywhere.

In this situation, whatever may be my wishes, I can find no legal ground for *our beginning* now to add it to our criminal catalogue.

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It has been said, that it is in the power of this Court to declare, that is, to *introduce*, new crimes; and that if it be in our power, it is our duty to do so on fitting occasions. I dissent utterly from this doctrine; and, if a proper occasion for discussing it shall ever arise, I shall endeavour to explain why I do so. I may only say at present, that I am far from holding that the Court can never deal with any thing as a crime, unless there be a fixed *nomen juris* for the specific act, or unless there be a *direct precedent*. An old crime may certainly be committed in a new way; and a case, though never occurring before in its facts, may fall within the *spirit* of a previous decision, or within an established *general principle*. And such is the comprehensiveness of our common law, that it is no easy matter for any newly invented guilt to escape it. But this is not the meaning of the doctrine, as usually announced, when it is said that this Court can declare new crimes. There is no such declaration, nor the exercise of any extraordinary power needed, in the Court's merely determining that an act that has never presented itself before, *comes within the range of a known term, case, or principle*. The meaning of the doctrine is this, —that though vice may invent a *totally original offence*, —never heard of before,—and for which law has not only no name, but which is not included within any known penal description or principle, *but which is in its whole nature entirely new*,—still, *if it imply wickedness and be hurtful*, the Court of Justiciary, *treating it as an entirely unheard of thing*, may, in virtue of what is termed its "*inherent powers*," introduce it as a new crime.

It is from this that I dissent. I conceive the power ascribed to us to be inconsistent with the proper constitu-

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tional limits of any British court. I am aware of the opinion of Mr. Baron Hume, and of the weight due to it; but, *upon such a subject*, I care little for the theory, or the doctrine, of any modern institutional writer; or even for occasional *obiter dicta* from the Bench. I must see the power recognised by Parliament, or practised by the Court *so long and so directly*, that the sanction of Parliament, and the acquiescence of the public are implied. Now, I have never heard it stated that there is any Parliamentary recognition. On the contrary, almost every statute declaring a new crime, (and of these there are far more, both before and after the Union, than is commonly supposed), is a virtual expression of the principle that the Supreme Criminal Court had no dormant power to do so. And except in the single, and very recent, case of combination, I can discover no proceeding by the Court directly resting on the exercise of this power. There are only other two cases ever referred to, viz. that of Gray, in 1737, for sending a threatening letter, and that of Wright, in 1809, for child stealing.

Now, in Gray's case, there could be no occasion for the exercise of this power, even though it had existed. Because the charge was that of "*attempting to extort money*, &c. "by sending any letter and demanding money to be left "or laid down in a certain place, accompanied *with* "*threatenings to murder the person, or burn and destroy* "the houses, &c., and other dreadful threatenings, &c., if "such violent and unlawful demands shall not be com- "plied with." There surely could never, at any period, be a doubt whether it was a crime at common law, to put a person into bodily fear by threats, for the purpose of extortion; or that it made any difference whether the threats were verbal or written. Accordingly, so far as appears from the record, or from any report, there was not one word said about the Court's inherent powers to create this, or any thing else, an offence. On the contrary, the pannel admitted that it was an offence. Lord Kames, who signs his Information, says,—"The pannel was far from plead-

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" ing that the facts libelled were innocent, and merited " no censure, and he must yield that an inchoate criminal " act is a crime,—to be punished arbitrarily in propor- " tion to the mischief intended." The Informations, accordingly, were ordered on two questions, whether an English statute applied to Scotland, and what was the proper punishment; at least they argue nothing else. There was plainly no judicial legislation exercised here.

As to the case of Wright, it had no connection with this matter at all. The relevancy was found, without any objection being stated. This fact of itself implies that it had not been felt that there was any thing new in the case. But, on the prosecutor's moving for judgment, a debate arose, which was confined solely to these two points:—1st, Whether the abstraction of a living child could be punished as a *theft*, a human being not being property; 2d. Whether the punishment could be capital. This supposed power of the Court was, no doubt, generally alluded to, and assumed, by some of the Judges; but the question was not raised, and could not be, and was not discussed or decided.

Combination is the only case. It was at first decided that it was no crime. A different view afterwards prevailed,—and I have mentioned the result.

But I repeat that it is really not necessary to discuss this matter at present, because this is not the ground on which the relevancy of this charge is maintained. The prosecutor's plea is, that though the particular act which he charges be new, the legal principle by which he seeks to have it punished is old. And, no doubt, if he could establish that the act came within the *principle* of one of the establised denominations of our common law, the mere novelty of its *external form* would be immaterial.

But what is the principle on which he rests? Merely this, that, independently of all fraud or disturbance, a gambling-house is criminal, *purely because it is inexpedient, or in other words dangerous.* He sums up his case very distinctly and very fairly in these words, " The In-

"formant, in conclusion, would desire to rest his case upon "the maxim, that no overt act, deeply injurious to in- "dividuals, and to society, can be considered beyond the "reach of punishment by the common law of Scotland."

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Now this is a principle to which I find it impossible to accede. No doubt danger is a quality of all crimes; the law punishing nothing that is supposed to be harmless. But it is the province of the legislature to declare what shall be held to be dangerous; at least it does not appear to me, that after the existing criminal code has been fixed by long judicial precedent, this is the province of a court, unless a power of criminal enactment be secured to it prospectively. The prosecutor's argument implies that such a power has been secured for this Court, in the exercise of which it does not require any thing else to warrant the introduction of a new offence, though consisting of very old acts, except the ascertainment of the fact that these acts are dangerous, and proceed from vice. But where is this principle to be found stated? Certainly in no judgment, or work of authority, or any where except in a few occasional speculative arguments. In the first combination case, (Taylor, in 1808), when combination was found not to be indictable, the three Judges who were of that opinion expressly admitted the public danger, but as expressly held, that this did not warrant the Court's interference. The opposite principle indeed is inconsistent with the practice of the Court, and with the understanding of the country. If every thing dangerous, or we shall say, dangerous to *public morals*, be a point of dittay in the Court of Justiciary, how does it happen, since we have always had a public prosecutor, whose duty it has been to see the criminal law enforced, that any thing dangerous to public morals remains unpunished. There are innumerable notorious overt acts, with which society is quite familiar, that are deeply injurious to individuals, and to the public, to which, nevertheless, it would be considered utterly extravagant to attempt to apply the penalties of the common law. Many examples are given in the Information for the

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pannels, and others might, on a moment's recollection, be stated. They are so numerous that the selection of instances seems only to weaken the force of the general fact. The prosecutor's principle could not be applied fairly to all cases, without making the administration of law capricious and ludicrous. For it will always be kept in view, that *dangerousness* is to be judged of *by the Court.* It must be what *the Judges may think* hurtful, that is to be dealt with judicially as criminal. Now, how many things are there which society tolerates and enjoys, that are condemned and avoided by wise and good men, on the ground of their immorality? Would it be difficult to obtain, at this moment, a Court composed of able, upright, and learned lawyers, in the sight of every one of whom, the race-course, the hunting-field, and above all, the theatre, is each an abomination, purely from what they think its audacious and profligate corruption of public morals? I see no ground for supposing that the law ever meant to subject the people to so arbitrary a rule, as that their conduct, even in doing what had been done by others with impunity for ages, was to be deemed criminal or not, solely according to the varying and speculative views of Courts.

In the absence of all Scotch authority, reference has been made to the law of England. It is a dangerous thing to involve the lieges of our land in penal maxims imported from abroad; and there is no part of the English system from which, on other accounts, I am less desirous to borrow, than from its criminal code. The moral policy of the two countries is, to a certain extent the same; but it is quite clear that the law of England proceeds in this matter on principles which we do not acknowledge, or perhaps understand. It punishes the keeper of a gaming-house, because it punishes the committer of a *nuisance*; and it seems to be only, or chiefly as nuisances that this act is charged in their Indictments; and this certainly is no principle, and not even in this sense a term, in the criminal law of Scotland. Besides, so far as I can see from the cases referred to, the *fraudulent nature of the*

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gaming seems always to have been considered as essential to the charge. No doubt it is laid down by Mr. Justice Best, to be "*quite clear*, that any practice which has A "TENDENCY to injure the public morals, is a common "law offence!" It may be so in England, but its being so, is only a proof to me of the difference between their system and ours. Let the Lord Advocate act upon this principle *fairly* for one month, by prosecuting every thing that has even a *tendency* to hurt morals, and the accuracy of the definition, as applied to this country, will be seen.

I am not moved, therefore, by the mere union of vice and of public danger, which the keeping of a common-gambling-house implies. On the contrary, the perniciousness of this combination only makes me rely with the greater certainty on its being put down by Parliament; whose duties I am not impatient to anticipate. An individual culprit may escape, but no permanent injury will be inflicted on society; and the Court will be saved from being committed to a principle, which, if once adopted, must often meet us in awkward and impracticable shapes.

The Court accordingly repelled the objections to the relevancy of the Indictment, and, on the motion of the Lord Advocate, continued the diet against the pannel, and the other persons accused, till a future day.[1]

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[1] The diet was again called against Bernard Greenhuff, on the 21st of January 1839, when the Public Prosecutor consented to the word "hazard" being struck out of the Indictment, and the pannel having pleaded guilty as libelled, under this limitation, was sentenced to be imprisoned in the Jail of Edinburgh, for the period of two calendar months. On the same day, sentence of fugitation and forfeiture of the bail bond was pronounced against Charles Staten, who failed to appear. No further proceedings took place against the other persons accused.

GLASGOW CIRCUIT.

Winter, 1839.

Jan. 11 1839.

Judges—LORDS MACKENZIE AND MEDWYN.

HER MAJESTY'S ADVOCATE—*Davidson*—*J. T. Gordon.*

AGAINST

AGNES LOGG—*A. Wood, Jun.*

UTTERING BASE COIN.—STATUTE 2ND WILLIAM IV., c. 34.—Question, whether base coin, not yet in a condition to be uttered, but to complete which, an additional process is necessary, can be held to fall under the description in the statute of coins "resembling, or apparently intended to resemble, or pass for" current coin.

No. 49. Agnes Logg.

Uttering Base Coin.

AGNES LOGG or BROGAN was charged with Contravention of the Act 2nd William IV., c. 34, entitled "an Act "for consolidating and amending the laws against offences "relative to the Coin," by which it is enacted, § 8,

"That if any person shall have in his custody or possession, three "or more pieces of false or counterfeit coin, resembling, or apparently "intended to resemble or pass for, any of the King's current gold or "silver coin, knowing the same to be false or counterfeit, and with in- "tent to utter or put off the same, every such offender shall, in England "and Ireland, be guilty of a misdemeanour, and in Scotland, of a crime "and offence; and, being convicted thereof, shall be liable, at the dis- "cretion of the Court, to be imprisoned for any term not exceeding "three years: IN SO FAR AS, on the 20th of October 1838, in or near the shop situated in or near Stockwell street, Glasgow, occupied by Thomas Wilson, baker, the said Agnes Logg or Brogan had in her custody or possession, 27 or thereby pieces of false or counterfeit coin, each resembling, or apparently intended to resemble or pass for a shilling-piece of the Queen's current silver coin; as also, 27 or thereby pieces of false or counterfeit coin, each resembling, or apparently intended to resemble or pass for a sixpence of the Queen's current silver coin, she knowing the said coins to be false or counterfeit, and with intent to utter or put off the same.

The pannel pleaded not guilty, and a proof was led, from which it appeared that a great proportion of the coin found in her possession, was not in such a state as would

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induce any one to take it as genuine, considerable portions of metal being attached to every piece, which would require to be removed before the coins could pass.

The ADVOCATE-DEPUTE, for the prosecution, argued,—(1.) The words "apparently *intended to resemble*, or pass for any of the King's current gold or silver coin," are introduced into the statute, specially to cover a case of this nature. (2.) The third section of the Act,[1] under which the crime of making counterfeit coin is complete, although the counterfeit is not perfect, nor the process of counterfeiting finished, must be held to explain the sense in which the words "intended to resemble" should be read throughout the statute. (3.) Besides, six at least, of the coins found in the pannel's possession, have been proved to be in such a state that they might be uttered, and would pass.

A. WOOD, for the pannel, answered,—that since the coins found in the possession of the pannel were not finished, but still required some process to complete the counterfeit, and render them in appearance such as might be taken by any one as genuine money, the pannel could not be convicted of the statutory offence.

The Court held, that in the state of the evidence, the third answer to the argument maintained for the pannel was quite conclusive, and that it was therefore unnecessary to decide the other points.

The Jury found the pannel guilty of having three or more pieces of counterfeit coin in her possession as libelled.

In respect of which verdict of Assize, she was sentenced to be imprisoned in the Bridewell of Glasgow, for the period of eighteen calendar months.

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[1] This section, after enacting the punishment to be awarded against any person who "shall falsely make, or counterfeit any coin resembling, "or apparently intended to resemble, or pass for any of the King's cur- "rent gold or silver coin," provides, that "every such offence shall be "deemed to be complete, *although the coin* so made or counterfeited, "*shall not be in a fit state to be uttered, or the counterfeiting thereof* "*shall not be finished or perfected.*"

HIGH COURT.

Present,

Jan. 23 1839.

LORDS MEADOWBANK, MACKENZIE, MONCREIFF, MEDWYN,

COCKBURN.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Rutherfurd—Handyside.*

AGAINST

JOHN BARR.—*Craufurd.*

TAKING A FALSE OATH.—STATUTE 2D AND 3D WILLIAM IV., c. 65.—The taking, falsely, the oath prescribed by the Reform act, (Schedule I.), held not to be perjury,—but found, nevertheless, to be an indictable offence at common law.

No. 50. John Barr.

Taking a False Oath.

JOHN BARR was indicted to stand his trial at the Glasgow Circuit in January 1838, for the crime of "wickedly, "wilfully, and knowingly Swearing or Making, Falsely and "Fraudulently, an Oath or a Declaration, by Act of Paliament ordained to be taken or made on due requisition, "as the condition of exercising the right of voting in the "election of a member to serve in the Commons House "of Parliament:"

IN SO FAR AS, by an Act passed in the second and third year of the reign of his late Majesty King William the Fourth, chapter 65, entituled "an Act to amend the representation of the people in Scotland:" it is enacted by section 26th, "That in all elections after the end of "this present Parliament, every qualified person whose name shall ap- "pear in the last corrected register, and none other, shall be entitled to "vote; and it shall not be competent to enquire on that occasion into "any other facts, except those of the party tendering the vote being "truly the individual mentioned in the said register, of his being still "possessed of the qualification there recorded, on his own account, and "not in trust for, or at the pleasure of, any other person, and of his not "having previously voted at that election: Provided always, that the "enquiry into these facts, shall, on this occasion, be confined to the "putting to the person so tendering his vote, if the Sheriff shall be re- "quired so to do on behalf of any candidate, an oath, or, if he be a "Quaker or Moravian, a solemn affirmation, in the form of the Schedule "(I.) to this Act annexed; and it shall not be competent at any such

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"poll or election, to put to any registered voter, any other oath or af-
"firmation whatsoever, except only an oath or affirmation against brib-
"ery, which, if required on the part of any candidate, shall then be put
"by the Sheriff in the form of Schedule (K.) to this Act annexed:
"Provided always, that any person who has claimed to be registered,
"but whose claim has been rejected by the Sheriff or Court of Review,
"may, notwithstanding, tender his vote at any election, where such
"register is in force; and the Sheriff, or his Substitute, shall enter any
"vote so tendered, with the name of the person for whom it is given,
"distinguishing the same from the votes given by persons on the regis-
"ter; so that it may be in the power of any election committee to give
"effect to such vote in deciding upon the validity of any disputed elec-
"tion; but no scrutiny shall be allowed by, or before any returning
"officer, with regard to any votes given or tendered at any such elec-
"tion,"—which Schedule (I.), referred to as being annexed to said Act, is in the following terms:—"I, A. B. do solemnly swear [or af-
"firm] That I am the individual described in the register for
" as A. B. of [*here insert description in the
"same words as contained in the register*] that I am still the proprietor
"[*or* occupant] of the property for which I am so registered, and hold
"the same for my own benefit, and not in trust for, or at the pleasure
"of any other person; and that I have not already voted at this elec-
"tion:" And the said John Barr having been, on or about the eight day of September 1835, duly registered in terms of said act, as a qualified voter for the city or town of Glasgow, as tenant of a house and shop, No. 16. Campbell street, in the said city or town, in terms of a claim signed by him, bearing to have been subscribed by him, at Glasgow, 20th of July 1835; and a writ for the election of a member to serve in Parliament for the city of Glasgow, having been duly proclaimed by the Sheriff of Lanarkshire, on or about the 25th day of May 1837; and a poll having been demanded, and the said Sheriff having, in terms of said act, and of another act passed in the fifth and sixth years of the reign of his late Majesty, chapter 78, named and appointed the 26th day of May 1837, to be the day of polling, at places previously appointed, in terms of said acts, or one or other of them: And the said John Barr having, on the said 26th day of May 1837, &c., and within Saint John's Church Session house, in the said city or town, being one of the polling-places duly appointed, in terms of said acts, or one or other of them, tendered his vote at said election as a qualified voter, in terms of the registration above libelled; and Robert Reid, writer in Glasgow, &c., then acting as polling-sheriff at said polling-place, by virtue of a nomination or appointment made by the said Sheriff of Lanarkshire, in his favour, in terms of said act, having been required by James Morrison, writer in Glasgow, &c., one of the agents and mandatories, or otherwise acting in behalf of Robert Monteith, Esquire, younger of Carstairs, one of the candidates at said election, to put to

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the said John Barr the oath or declaration, in the form of the said schedule (I.), annexed to the foresaid act, as above libelled, the said Robert Reid thereupon administered to him, the said John Barr, in usual and accustomed form, the said oath or declaration: And the said John Barr, taking or making the said oath or declaration, did then and there, in presence of the said Robert Reid, wickedly, wilfully, knowingly, falsely, and fraudulently swear an oath, or make a declaration, in the following terms, or terms of the same meaning, import, or effect:—"I "John Barr, do solemnly swear that I am the individual described in "the register for the city or town of Glasgow, as John Barr, dyer, ten-"ant, house and shop, 16. Campbell street, Glasgow,—that I am still "the occupant of the property for which I am so registered, and hold "the same for my own benefit, and not in trust for, or at the pleasure "of, any other person, and that I have not already voted at this elec-"tion:" Whereas, the said oath or declaration was false, and was known by him at the time of swearing or making the same to be false, inasmuch as the truth is, and it will be proved, and he then well knew that he was not then the occupant of the said house and shop, 16. Campbell street; but that previous to or about the term of Martinmas 1836, he had quitted and removed from the said house and shop, and had sub-let the same to William Leggat, carter in Gallowgate street aforesaid; and the said house and shop were occupied under the said William Leggat, or under and with consent of Archibald Sinclair, smith and farrier in Glasgow, the landlord thereof, by Robert Wallace, carter, and Charles Watt, founder, or one or other of them, at the time of his emitting the said oath, or making the said declaration: And having sworn the above oath, or made the above declaration, he, thereafter, in respect of it, became entitled, and would not otherwise have been entitled, to have his vote so tendered by him, taken by the said polling-sheriff, and recorded by said polling-clerk, which was done by them respectively; and he thus voted at said election, in defraud of the rights of the electors or voters for the said city or town, and more especially of said Robert Monteith, Esquire, as candidate aforesaid, and of the voters of the said city or town who voted or polled for the said Robert Monteith:[1]

CRAUFURD, for the pannel,—having objected to the

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[1] For a charge similar to the present, brought against a pannel under the *nomen juris* of Perjury, see the case of Nathan M'Lachlan, July 17 1837. (Swinton, Vol. I. p. 528.) Informations were ordered on the relevancy of the Indictment, in that case. But the Public Prosecutor allowed the charge to drop, having satisfied himself that the omission in the oath of an appeal to the Deity, was an insuperable objection to sustaining a charge of perjury.

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relevancy of the Indictment, Lords Medwyn and Cockburn certified the case to the High Court.

On the 12th of March 1838, Informations were ordered on the relevancy of the Indictment.

In the Information for the prosecution it was argued,—The two points which appear to present themselves for discussion in this case, are (1.) Do the facts stated in the minor proposition amount to a point of dittay? And (2.) Is the charge in the major proposition the proper mode of libelling the offence?

(1.) In considering the first point, and judging of the nature and character of the crime imputed to the pannel, it is necessary to bear in mind the general provisions of the act of the last king to amend the representation of the people in Scotland. This statute, following up in that respect our own peculiar practice of having a roll of freeholders, provided that a register should be made up of the voters for the respective counties and burghs. The form in which the register is to be kept is set forth in Schedule G of the act. Of this schedule, it is sufficient to remark, that it is so framed as distinctly to identify the individual voter, and the property in respect of which he is placed on the register. It is needless to mention what entitles a person to have his name put upon the register, or the scrutiny which his claim must undergo before registration, further than to remark, that though the voter may possess the property, in virtue of which he is enrolled as an elector, at the time of registration, his right to it may have ceased before an election takes place. But as the name of the voter being on the register, is declared by the act to be sufficient to enable him to give his vote, and no inquiry is permitted at the time of election, whether the voter be still qualified or not,—the Legislature has provided a check, analogous to the old oath of trust and possession, by which a candidate is allowed to put to an elector tendering his vote, an oath in the form set forth in Schedule I, upon the points, *inter alia*, of his

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being still in possession of the property for which he is registered, and that he holds the same for his own benefit. Upon taking that oath, if tendered to him, the person so registered is entitled to vote, and not otherwise.

Now, the question is, whether the falsely taking that oath is not a point of dittay? Of the crime committed in falsely taking the old trust oath of the 7 Geo. II. cap. 16, there never could be any doubt that it amounted to perjury. For, in the *first* place, it bore to be taken "in the presence of God;" and, in the next place, the statute provided, that if falsely sworn, the party convicted thereof should incur the pains of perjury. But the act of the late King, prescribing a new form of oath, suited to the altered parliamentary franchise, does not require that the party swear "in the presence of God;" and there is no provision which might supply that defect, by declaring that a party falsely swearing the new oath shall incur the pains of perjury. That crime, then, being out of the question, the point for the Court to consider is, whether, independent of the form of the oath, and the want of any specific provision as to the pains of law which shall be incurred by taking it falsely, the common law will not reach, and punish the individual, who wrongfully exercises the elective franchise, by means of falsely swearing in terms of the present oath.

On referring to the oath, it will be observed that it embraces four separate points: 1. That the person taking it is the individual described in the register: 2. That he is still the proprietor [or occupant] of the property for which he is so registered: 3. That he holds the same for his own benefit, and not in trust for, or at the pleasure of, another; and, 4. That he has not already voted at the same election.

In the present libel against the pannel, the charge against him is, that he took this oath, although he knew that, at the time, he had ceased to be occupant of the property for which he had been registered, and by so swearing contrary to the fact, he became entitled to have

his vote received, and did actually vote at the last election.

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Now, in determining whether this proceeding of the pannel did not involve him in a crime at common law, it is necessary to observe what it included. In the first place, he falsely assumed to himself an important constitutional privilege, which the wisdom of Parliament expressly excluded him from, and declared should not be exercised by persons in his situation. He fraudulently intruded himself into the electoral body, and participated in the franchise which belonged to others who were solely entitled to exercise it. He wilfully acted in defiance of the express provisions of the statute law of the land, thus contemning the authority of Parliament. This of itself would have been sufficient to expose him to prosecution, as for a wilful violation of the law. It will scarcely be said that positive infractions of an act of Parliament, though no specific punishment for the violation be provided in the act, are not delinquencies in themselves, and may not be prosecuted for the public interest, and repressed by such arbitrary pains, at the discretion of the judge, as shall appear suitable to the gravity of the offence. And if it be a delict, wilfully to break through the provisions of a public statute, certainly it is one of the most aggravated kind, when it is a statute settling the constitutional rights of the people—thus interfering with their electoral rights, and affecting the purity of the elective franchise, and thereby the constitution of the representative branch of the legislature.

In the *second* place, the proceeding of the pannel amounts to a fraudulent and dishonest act. It is a wicked and felonious appropriation to himself of a share in the electoral franchise, which the law has expressly confined at each election to a limited body. It is a fraudulent abstraction from the value and importance of the franchise possessed by that body, through an unwarrantable and illegal participation by him in its rights. It might be the means of determining the result of an elec-

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tion, and the return of a candidate who is not the choice of a majority of those electors really possessed of the franchise, but of a minority only, assisted by the fictitious votes of unqualified persons.

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In the *third* place, and this is the gravamen of the present charge, the wickedness of the act is exemplified in the franchise being assumed, and the vote given, by setting at naught the check imposed to the violation of the statute, in an appeal to the conscience of the people, through the solemnity of an oath publicly sworn, and deliberately taken. Although this oath be not expressed in the broadest form, nor contain any imprecation on the taker of it, nor verbal appeal to the Deity, yet, bearing as it does the words, "I do solemnly swear," and administered by a person in virtue of his office, whether judicial or ministerial, it must, it is thought, be considered to be the highest description of falsehood, short of perjury, known to the law. And were it not punishable it would be *pessimi exempli*.

Without giving any precise definition of what constitutes a crime, Baron Hume observes, (Vol. i. p. 21,) that, "in exacting atonement, the law always supposes that "the delinquent has infringed in some respect those du- "ties which he *owes to the community*: he has set a *dan- "gerous example* of violence, *dishonesty*, *falsehood*, inde- "cency, irreligion; or he has trespassed with respect to "some of those other articles of wholesome discipline or "wise economy, *which affect the public welfare*, and are "*matters of general concernment*." That the act of the pannel falls within this description of the nature of a crime, seems too clear, after what has been stated, to admit of discussion.

In the absence of precedent in the Courts of Scotland, reference may be made to the law of England.

It would rather appear that, according to that law, every open violation of the prohibitions of a statute is indictable as a misdemeanour. (1. Hawkins, P. C. cap. 22.) And, in treating of indictable offences, Mr. Russell says, (Vol. i. p. 44,) "It seems to be an established principle

"that whatever openly outrages decency, and is injurious "to public morals, is a misdemeanour at common law. "Also, it seems to be a good general ground, that where- "ever *a statute prohibits a matter of public grievance to* "*the liberties and security of a subject*, or commands a "matter of public convenience, as the repairing the com- "mon streets of a town, *an offender against such statute is* "*punishable*, not only at the suit of the party aggrieved, "but also *by way of indictment for his contempt of the* "*statute*, unless such method of proceeding do manifestly "appear to be excluded by it." It is to be observed, that though the illustration introduced by the author is not at all in point in the present question, yet the *principle* upon which the act is said to be indictable, as a misdemeanour, is *the contempt of the statute.*

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In regard to perjury, the law of England seems to stand on very much the same footing with our own. Thus, at common law, and independent of statute, an indictment will not lie for perjury, except where the oath is emitted in a judicial proceeding, and before a competent Court. (2. Russell, p. 518.) But though not amounting to perjury, false oaths are indictable as misdemeanours. It was observed by Lord Eldon, in reference to an affidavit which had been falsely sworn, that though under the circumstances, it "might not be the subject of "an indictment as perjury, yet it would constitute a "species of misdemeanour, and be punishable as such." (2. Rose's Bankruptcy Cases, p. 258.) And, accordingly, Mr. Russell (Vol. ii. p. 522), states in general terms, "In "some cases where a false oath has been taken, the party "may be prosecuted by indictment at common law, though "the offence may not amount to perjury."

Again, Lord Tenterden, in trying a case for perjury, (Rex *v.* Mudie, Nov. 26, 1831; Moody and Robinson, Nisi Prius Cases, p. 131,) observed, "The legal offence "of perjury can only be committed in certain cases of "oaths taken under the common law, or in oaths taken "under particular statutes, in which the offence is pro-

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" vided for. It by no means necessarily follows, that " perjury must be committed in a false oath taken under " a particular statute. *Though a high misdemeanour*, it " would not be perjury, unless so made by the statute re- " quiring the oath ; and there are many cases of statutes " requiring oaths, and not creating the offence."

A case has recently been tried in England, which seems to have a pointed application to the circumstances of the present Indictment. Candidates for a seat in Parliament are required in that country to possess a certain estate, and they are obliged, when they appear as candidates, to swear to their qualification and its value, upon due requisition made by an opposing candidate, or persons having right to vote at that election. This was introduced by the statute 9 Anne, cap. 5, which prescribes the form of the oath to be taken, and provides that it shall be administered by the sheriff, mayor, or other officer who takes the poll, or makes the return, or shall be taken before a magistrate. The act, however, contains nothing as to the punishment to follow, in case the oath shall be falsely taken by any candidate. With reference to the present case it is important to remark, that the form of the oath, prescribed by that statute, does not contain any declaration, that it is taken " in the presence of God," or conclude with the words, " So help me God." It commences, " I, A. B. do swear that I truly and *bona fide* " have such an estate," &c. But, notwithstanding, it is called an oath throughout the act ; and it does not appear to be questioned, that such word is correctly used in describing it.

In 1835, Sir John Edmund de Beauvoir, who stood candidate for the burgh of Windsor in that year, was tried on an indictment for taking the oath falsely, before the Police magistrates at Hatton Garden. (June 30, 1835. Carrington and Payne's Nisi Prius Reports, Vol. vii. p. 17.) In summing up to the Jury, Lord Denman observed, in regard to the offence charged, " This is an in- " dictment charging the defendant with having taken *a*

"*false oath*. It is not, properly speaking, perjury, be- "cause the same consequences do not attach. But *it is a* "*misdemeanour in falsely taking an oath*, which a party "is required by act of Parliament to take before a magis- "trate. You must be convinced that the statement was "false, and that at the time he made it, he knew it to be "so," &c. The Jury found the accused not guilty, declaring that they did not believe that he knew the property he swore to, to be under the value.

It seems settled then in the law and practice of England, that the taking of a false oath under a statute not declaring it perjury, is yet a misdemeanour or offence indictable at common law; and, so far as any argument can be drawn from the common law of England, and the practice of its criminal courts, all that weight of authority is in favour of the present Indictment, both as to its matter, and as to its form.

(2.) The remaining point for discussion is, whether the Prosecutor has stated the proper major in libelling the offence.

That offence does not appear to fall under a charge of fraud and wilful imposition. That would seem to involve some *deception* practised on the persons defrauded or imposed on. Baron Hume defines fraud, by identifying it with the English crime of swindling. It would seem that there must be an *imposition* committed on some one—a *deceit* successfully practised. This could not very consistently be alleged in the present circumstances. For the demand that the oath should be put to the pannel, proves that the parties who suffered by his proceeding knew that he had no real right to exercise the franchise, and gave no credit to his claim to participate in it. But their knowledge of the true circumstances was unavailing to protect them against the meditated offence, except by the appeal to the pannel's conscience, in tendering to him the oath. If he took it, the candidate and electoral body were disarmed, and unresistingly injured by the pannel.

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Anticipating the objections which might be raised upon these grounds, had the major libelled falsehood, fraud, and wilful imposition, the Prosecutor has discarded that mode of charging the offence. He conceived it more advisable to lay the libel specially for that branch of the *crimen falsi*, which consists in taking a false oath with a fraudulent purpose, and to give a descriptive major applicable to the precise state of facts alleged in the minor.

It is argued for the pannel, that it is a misnomer to call the oath sworn by him an oath in the *legal* sense, because it does not contain an appeal to the Deity. It is thought, however, that its being so designated in the act of Parliament is a sufficient authority for using the term in the Indictment. But, to anticipate any objection on this ground, it has been called alternatively a declaration, both in the major and minor proposition. This, at least, appears to be an unexceptionable descriptive term. The charge set forth in the major proposition is not, as the pannel argues, an alternative charge. It is not the swearing an oath falsely, *or* the making a false declaration,—one or other of them. The crime charged is the single individual fact of falsely emitting a certain form of words, prescribed for a particular occasion,—be the same an oath or a declaration.

It is remarkable that it is no where argued for the pannel, that the offence described in the major is not a complete criminal act. He limits his objection to contending, that it approaches near, and partakes much of the character of both perjury and fraud; but because it is not technically laid to suit either of these, it cannot be sustained as a relevant charge at common law. But it is surely too late now to argue, that because this crime charged against the pannel, does not come under any of the short list of definite *nomina juris*, and requires a descriptive title, it cannot, therefore, be admitted as an indictable offence.

It is to be considered that the offence charged is no common lie or false personation. The occasion is very

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important, and one which is watched with great jealousy by the Legislature, and ought to be protected by courts of justice. The act of Parliament declares, that the elector's right of voting shall depend on his emitting a certain form of words, which, for convenience, the act calls an oath. This is made "the condition of exercising the right of voting," to use the words of the Indictment. The oath is to be administered by the Sheriff, an officer of high trust, whether judicial or ministerial, and in the public view of all the parties assembled for the election. In such a situation, and after due warning, to be guilty of deliberate and wilful falsehood, seems as flagitious and open a violation of the public law as can be imagined. But, if this solemn act be committed *fraudulently*, as stated in the major,—*in defraud of the rights* of the real electors and the candidate, as set forth in the minor,—and to impede them in a valuable constitutional privilege, it acquires the full character of a crime, not only against the law and the public, but in prejudice of individuals. It can scarcely even be maintained that the fraud has not been completed, and turned to some use, since the condition or barrier imposed by the law has been overcome. But it is submitted with great confidence, that though, in cases of forgery and fraud, some use must be made of the fraudulent act or the forged writing, to render the case indictable, that cannot be carried by implication into the present case; or, if it could, the act must be considered complete, and the fraudulent advantage taken, in the daring and public assumption of a false character, and the acquisition thereby of a right to exercise the franchise. But, in truth, this part of our criminal law, with regard to fraud and forgery, is based on a reasonable and very evident consideration. The mere copying a subscription, or personating a character, are not in themselves criminal. It is the fraudulent purpose that makes them so; and the law requires, in proof of the fraudulent intent, that the act shall be turned to a use prejudicial to some party.

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But it is very different with a charge like the present. The true analogy for this charge is not to be sought in the crimes of fraud or forgery. It presents itself in the common law crime of perjury, which this offence so nearly approaches in its character. Now, in perjury it is not required that the false swearer shall have benefited by his oath. The crime is held to be completed in the daring violation of the law, by the solemn act of falsehood, under some form of imprecation of the Deity. It is no matter though the object of the crime has been entirely defeated; and in practice it constantly happens, that punishment ensues, where the perjurer has been detected and apprehended, in the very commission of the crime of false swearing. So here it is immaterial, whether the accused, after the public and gross fraud committed by him, went on to exercise the power which he gained by his solemn false declaration. That solemnity is the marking feature of his crime; and it seems inexpedient to make the criminality rest on that which is only a consequence, or a secondary part of the offence.

In the Information for the pannel, it was argued,—1. The libel is incorrectly and irrelevantly laid, and no conviction of either of the offences alternatively charged could competently follow upon it.

There is no charge of perjury; and it is admitted that the offence libelled does not amount to that high crime. It is, however, charged as the taking of a *false oath*, or making a *false declaration*; and the pannel is therefore compelled to advert to both branches of the alternative. In the *first* place, it is submitted that the declaration or asseveration contained in the words of schedule, (I.) being destitute of the proper sanction, cannot correctly receive the name of an oath, and is improperly so called in the Indictment.

That the invocation of the Supreme Being, as the approver of truth and the avenger of falsehood, is necessarily included in the notion of an oath in its proper sense, is

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plain from the authority of Scripture, permitting the use of oaths, which expressly declares that they shall be taken under this solemn sanction. (Deuteronomy, chap. vi. ver. 13; Isaiah xlv. 23; lxv. 16.)

In every definition of the term "*jus jurandum*," or "*jurare*," in the Roman law, this element of the invocation of the Deity to attest the truth of what is sworn, is invariably and specially involved; and it is plain that no asseveration, however solemn, was considered by the civilians as clothed with the proper character of an oath, if destitute of terms of direct invocation of the Divinity. (Voet. B. 12, tit. 2, sec. 2. Grotius, B. 2, chap. 13, sec. 10, and chap. 13, sec. 12. Titii Disputationes, Lib. 6, cap. 1, sec. 23. Curtius, Vol. iv. p. 348. See also Matthæus de Probationibus, chap. 1, sec. 20. Cicero de Officiis 3, 29; and Fleta, edited by John Selden, Lib. 5, c. 22.) The definitions of an oath given by Dr. Johnson, (Dict. *voce* Oath,) and Paley, (Moral Philosophy, B. 3, Part 1, c. 16,) are identical with those recognised in the Roman law.

Nor is it merely in the abstract definitions of the term oath, which philosophers in all ages have propounded, that the invocation of the Deity is thus essentially involved. The same principle has been laid down by our institutional writers, (Stair, B. 1, t. 17, sec. 14; Bankton, B. 4, t. 30, sec. 4; Hume, Vol. i. p. 369,) and practically recognised in more than one decision of the Supreme Courts, both in this country and in England. In the case of Mudie against Craigie, 1685. (Morrison, page 4419,) a report of a commission was found to be null, the oath reported containing no invocation of the Deity, although bearing that the witness was "deeply sworn;" and a similar decision was pronounced in a recent case. (A. B. Common Agent in Ranking and Sale, M'Donald, Feb. 20, 1838; D. B. and M. Vol. xvi. p. 630.) In the well known English case of Omichund *against* Barker, (Atkin's Reports, Vol. i. page 23,) when a Gentoo was first permitted to bear testimony according to the ce-

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remonies of his own religion, the whole theory of the essential elements and solemnities of an oath was fully argued and deliberately considered; and in the luminous and elaborate judgment of Lord Hardwick it is assumed throughout, that the invocation of a Supreme Being, in whom the juror believes, as the approver of truth, and the avenger of falsehood, is altogether indispensable. (See also the opinion of Lord Mansfield in Atcheson against Everett, Cowper's Reports, Vol. i. p. 389. Phillips' Law of Evidence, Vol. i. p. 21. Coke's Third Institute, c. 14, p. 164.)

It is difficult to imagine a more powerful and uniform stream of authorities in support of the position, that it is of the very essence of an oath, that it contains within itself an appeal to the Deity to attest the truth of what is sworn. It is true that the offence charged in this Indictment is not perjury; but one branch of the alternative accusation against the pannel is, that of wilfully swearing *a false oath*; and the authorities above quoted tend to establish—not that the particular crime known in law as perjury cannot be committed except by swearing falsely an oath, involving the solemn sanction of the invocation of the Deity—but that no asseveration, destitute of words importing such invocation, amounts to an oath at all, or can legally or logically be so denominated.

It is said, that as the statute applies the term oath to the declaration contained in schedule (I.), it cannot be incorrect to employ the same language in framing an Indictment which sets forth the provisions of that act. The answer is, that this Indictment is not under the act, not enjoined or permitted, and plainly not even contemplated, by any of its provisions. It may be true, that for the purposes of the act, the word oath being employed by the legislature, may be legitimately applied, although not strictly accurate. But punishment is not one of the purposes of the act; and it can be no justification of an inaccurate expression in a criminal libel, that the word erroneously em-

ployed occurs in a statute enacted for a purpose totally different, and not requiring the same strict propriety of language.

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The alternative charge of making a false declaration is also irrelevantly laid. This appears from considering, (1.) The structure of the Indictment. The major proposition contains an alternative charge of two distinct offences, —the swearing a false oath, and the making a false declaration; but the minor proposition commences, "Yet true "it is, and of verity, that you, John Barr, are guilty of "the said *crime*," the singular number being used, although two offences are alternatively charged in the major proposition. (Alison, Vol. ii. p. 245.) Again, after setting forth the terms of the oath or declaration, the libel proceeds, "Whereas the said oath, or declaration, was "false, and was known by you at the time of *swearing* the "same to be false,"—the word swearing referring only to the oath, and no word being used applicable to the declaration said to have been made; and after narrating what the Public Prosecutor avers to be the true state of the facts, follow the words, "At the time of your emitting *the said* "*oath*,"—the word declaration being here altogether dropped, an omission, especially when coupled with the previous inaccuracies, which is submitted to be fatal to the charge of making a false declaration, as separate and distinct from that of swearing a false oath.

(2.) The irrelevancy of the alternative charge of making a false declaration, also appears, on considering the distinction recognised throughout the statute, between the oath, as it is termed, administered to voters generally, and the solemn affirmation which Quakers or Moravians are permitted to take by special statutes, in which statutes the word declaration is used as synonymous wich affirmation. (7 and 8 Will. III. chap. 34, and 9 Geo. IV. chap. 29.) The pannel is not averred to be a Quaker or Moravian, nay, the words in which he is said to have sworn are in the Indictment set forth, "I, John Barr, do solemnly "swear," &c.; and therefore the Public Prosecutor is not

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entitled to accuse him of having made a declaration or affirmation which, by the very terms of the act, he was precluded from making, and on the face of the Indictment is admitted not to have made.

2. The taking falsely the oath or declaration on the occasion, and in the terms referred to in the Indictment, (1.) is not *per se* a substantive offence, cognizable and punishable at common law; and, (2.) it is not created a statutory offence by the 2d and 3rd Will. IV. c. 65, or any act of Parliament now in force.

(1.) This is believed to be the first case in which the taking of a false oath has been indicted under any other denomination than that of perjury; or in which the making a false declaration has ever been charged as a distinct and substantive offence, irrespective of any overt act of using it to the injury of another; and the fact that the present Indictment is unprecedented, is of itself a strong argument against its competency, since, although the statute of William IV. is recent, yet the practice of emitting oaths and making declarations is very ancient, and for similar prosecutions, if competent, there must have been frequent opportunities.

There is no decision, and no *dictum* of any institutional writer on the law of Scotland, to authorise an attempt to punish as a substantive offence the taking of any false oath which does not infer the guilt of perjury; the offence of wilfully, falsely, and fraudulently swearing an oath, as it is termed in this Indictment, is perjury, or nothing.

The crime of wilful perjury is one of a very peculiar nature. It is, with scarcely an exception, the only offence with which the law deals as a complete substantive crime, when not followed by any result, or aggravated by any evil intent. It is in its essential character the same, whether successful or foiled,—whether originating in malice or in affection,—whether committed to save the honour of a parent, or to sacrifice the life of an enemy. Perjury is not the highest denomination of a class of offences comprehended under the general title of taking false

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oaths; if it were, there would assuredly have been cases in which the offence was charged under a lower denomination: It is not the *nomen juris* applicable to the highest degree of guilt incurred by false swearing; for never was false swearing punished in Scotland, except as perjury. It is the legal denomination of that false swearing which, on account of some inherent peculiarity, is cognizable by law as a separate substantive offence, whatever may be its motives or it consequences. What is that peculiarity? In order to answer this question, it becomes necessary to examine still further the nature and character of the offence, and ascertain to what extent, and under what circumstances, the taking a false oath is cognisable and punishable by law.

That *all false oaths* are not indictable is certain. There are many oaths which, when taken falsely, involve the swearer in the deepest guilt in the sight of the Divine Being against whom he has offended, but which do not infer liability to punishment at the hands of any human tribunal: Such are all private oaths, all promissory oaths, and many others; while on the other hand perjury, or the taking falsely oaths of a different class, affecting and interfering with the administration of justice, has in all ages, and in all countries, been treated as a serious offence. The one class of oaths is not cognisable at all, the other class is cognisable, because amounting to perjury. The distinction between the two classes, and the reason why the law interferes in the one case and not in the other, rests upon a principle which lies at the very base of all criminal jurisprudence; and which, although not unfrequently forgotten in former days, has, in the humane and enlightened spirit of British law, been now admitted to universal acceptance. It is, that the law is administered for purposes of protection, not of vengeance,—for the good of society, not the atonement of crime;—that its force is repressive, not retributive;—and that, although moral guilt is essential to the constitution of crime, still it is not so much on account of the moral guilt, as of the social tendency of an act, that it is brought within the cogni-

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zance and subjected to the punishment of the law. There are many varieties of moral guilt of the deepest dye, and indirectly producing the most serious injury to our fellow-creatures, with which, nevertheless, the law does not deal, because they do not possess that which constitutes the peculiar character of public crime,—the combination of moral guilt with the production of direct social evil; they are, therefore, left to be repressed by the force of public opinion, and to be punished by the Almighty Being, to whom alone vengeance belongs, and whose sole and exclusive attribute it is to visit sin with retribution. To this class belongs the guilt of duplicity, treachery, ingratitude, and of all false oaths, promises, and declarations, which do not amount to perjury. The moral guilt incurred by him who takes a false oath in a private transaction, or deliberately violates a promissory oath, is as heinous as is the guilt of him who depones falsely on oath in a court of justice; yet the latter only is punished by human laws; because, in the latter case only is the social evil so manifest and so direct, as to call for the interference of laws instituted for the protection of society. That which renders the one offence cognizable by human laws, while the other is left to the vengeance of heaven, cannot be something common to both; it cannot be its falsehood, its impiety, its moral guilt; it must be something peculiar to the one, and arising out of the circumstances under which it is committed. Now, this peculiarity is simply its judicial character. That which the law views as specially requiring the exercise of its repressive force, is the corruption of the sources of evidence, the interference with the administration of public justice. On this principle it is, that extrajudicial oaths do not, when taken falsely, amount to perjury; and, because not amounting to perjury, are not, at common law, indictable as a substantive offence.

The definition of the crime of perjury given by Baron Hume, (vol. i. p. 366,) and Mr. Alison, (vol. i. p. 465,) is "the judicial affirmation of falsehood upon oath;" and in

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detailing the particulars necessary to the constitution of this offence, Hume says, that the falsehood must be on oath, absolute, wilful, judicial, and before a competent authority: and Alison says, "the oath must have been "before a judge or commissioner, legally entitled to put "it, and in relation to a matter involved in some judicial "process or investigation." (Alison, vol. i. p. 470.)

In England, the recognised definition of perjury at common law is still more articulate. Sir Edward Coke, whose definition is adopted by Blackstone, Russell, and other modern writers, thus defines it:—"wilful and cor-"rupt perjury is a crime committed, when a lawful oath "is administered in some judicial proceeding to a person "who swears wilfully, absolutely, and falsely, in a matter "material to the issue or point in question."—(Coke's 3d Inst. p. 164. Blackstone, vol. 4, p. 137. B. iv. c. 10, s. 16.)

These definitions, which are extremely accurate, have been very strictly acted upon both in England and Scotland; and recognised in several reported cases. (Cases of Barclay, 25th April 1601; Hume, vol. i. p. 371. J. and W. Wilson, Aberdeen, autumn 1803; Alison, vol. i. p. 471; Burnett, p. 206. The King *v.* Aylett, 1. T. R. 69. Baston *v.* Goach, 3 Salkeld, 269; Russell, vol. ii. p. 520. The King *v.* Cohen, 1 Starkie, p. 511. The King *v.* Alexander, O. B. 1767, 1 Leach, 63. The King *v.* Woodman, O. B. 1768, 1 Leach, 64. The King *v.* Foster, Russel and Ryland, p. 459.)

In point of fact, no extrajudicial oath has ever been charged as an indictable substantive crime at common law, either in England or Scotland, except under the name of perjury, and then only when declared by statute to amount to that offence; and no mere declaration, especially no extra-judicial declaration, has ever been taken cognizance of as a substantive offence at Common law, in either country, up to the date of the present Indictment.

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It is remarkable that in the Mosiac law, although there are many and distinct declarations of the heinous guilt incurred by the taking of a false oath, yet there is no provision for the visitation of such guilt as a crime against human laws, and cognizable by human tribunals. It is true that in the book of Deuteronomy, chap. 19, verse 19, a special retaliatory punishment is commanded against a false witness. But it is plain, from the whole tenor of this passage, and especially from the nature of the punishment awarded, that the malicious offence of false accusation, and not the guilt of false swearing, is here provided against. (Michælis, art. 256.)

In Greece, the same distinction appears to have been recognised between the guilt of a false witness and that of a false swearer,—of a judicial and an extrajudicial oath. (Potter's Grecian Antiquities, chap. 6.)

In Rome, a false witness was liable both to a criminal prosecution for perjury, and to an action for damages at the instance of the party aggrieved. (Code. Lib. 4, c. 22, 13.) Various punishments were at different times awarded against the man "*qui falsum testimonium dixisse convictus esset*:" But a false oath taken by a person not a witness, and in a proceeding not judicial, does not appear to have been treated as a substantive offence of which judges took cognizance, but to have been left to the punishment of heaven, according to the well-known maxim, "*Perjuria Deum solum ultorem habet.*" (Cicero de Legibus, 2. 9. Taciti Annal. 1. 73.)

The same principle has been adopted in most of the countries of modern Europe, particularly in Germany and France. (Heineccius, Elementa Juris Germanici, lib. 2, tit. 27.)

That the proceedings on the day of polling, at an election, are not properly judicial, seemed to be almost admitted by the Public Prosecutor; and the terms of the act of Parliament render the admission unavoidable. The mere accident that the Sheriff, who is selected as the polling officer, is possessed separately of a judicial character,

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does not affect the case; there are many instances in which the discharge of functions purely ministerial is committed by the legislature to persons who are judges in the local or even the supreme courts, but whose judicial character does not alter the ministerial nature of the office specially entrusted to them.

(2.) On referring to the statutes, both in England and Scotland, introducing the numerous oaths which, when taken falsely, amount to the guilt and have been frequently prosecuted as perjury, it will be found, that in every instance, the act introducing the oath specially declares, that the false swearing of it shall infer the guilt and penalties of perjury.

In the Excise acts, the Custom-House acts, the Stamp acts, the Mutiny acts, the acts regulating Courts Martial, the acts regarding proceedings before Parliamentary Committees, and many others which might be enumerated, and especially in the Sequestration act, under which convictions for perjury have been obtained, there is a distinct and express clause, declaring that the falsely swearing any of the oaths therein provided, shall be punishable as perjury. (See 46 Geo. III. c. 112, § 3; 6 Geo. IV. c. 106, § 31; 55 Geo. III. c. 184, § 63; 54 Geo. III. c. 137, § 33; see also Russell, vol. ii. p. 526.)

In the old election law both of England and Scotland, the oaths which the different acts of Parliament imposed, were uniformly declared by a special clause in the act, to be taken under the penalties of perjury if taken falsely, and at the date of the passing of the reform act, the false swearing of any oaths then exigible from electors, was punishable as perjury, in respect of the express provisions of the statutes, 2 George II. c. 24, § 5; 7 George II. c. 16, § 3; 16 George II. c. 2, § 39; 25 George III. c. 84, § 8. Now it is important to observe the manner in which the existing law was affected by the three different reform acts. In the English act, (2 William IV. c. 45), the oath of possession is provided for, and ordained to be administered on due requisition, and by the 75th section, it is enacted, that

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" all laws, statutes, and usages now in force, respecting the " election of members to serve in Parliament, for that part " of the United Kingdom, shall be, and remain *in full force*, " except so far as any of the said laws, statutes, or usages " are repealed or altered by this act, or are inconsistent " with the provisions thereof," thus continuing in force, the previous statutes making the false taking of election oaths perjury, and preserving the penalty which these statutes had imposed.

In the Irish reform act, 2 and 3 William IV., c. 88, the various oaths to be taken respectively by the electors holding different qualifications in county, city, or burgh, are enumerated, and (§ 55), the existing " laws, statutes, and " usages," are " re-enacted and declared to be in full force," " except in so far as repealed or altered by that act," and, by section 42, it is enacted, that " if any person shall, in " any oath or affirmation to be taken under this act, wilfully " and corruptly swear or affirm falsely, such person shall " be deemed *guilty of perjury*, and be liable to the same " pains, penalties, and punishments, as any person is now " liable to for wilful and corrupt perjury," thus affording a double security against the false swearing of these oaths, first by re-enacting the old laws, and also, in case of any dubiety by a special clause expressly imposing the penalties of perjury. In the Scottish reform act, 2 and 3 William IV. c. 65, there is *no* clause declaring the false swearing of the oaths prescribed by the statute, to amount to perjury; and the old laws on the subject, to preserve which in force, considering the entire change of system, procedure, and qualification, special words of re-enactment would have been necessary, are not merely allowed to repose in the oblivion to which the alteration in the mode and principle of elections had consigned them, but are by section 47, expressly " repealed, in so far as inconsistent or " at variance with the provisions of this act."

But further, the English reform act, section 58, prescribes certain questions to be put to the electors by the returning officer, if required. It is plain that the answer

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to these questions, in the affirmative, is just equivalent to *a declaration*, and is in no respect distinguishable from the terms of schedule (I.) in the Scottish act, supposing the declaration therein not to amount to an oath, because devoid of any words importing a direct appeal to the Deity; and if a false declaration is indictable at common law, the answering these questions falsely must be equally so. But the legislature, apparently satisfied of the inadequacy of the common law to reach the offence of making without using a false declaration, has expressly provided, that, "if any person shall wilfully make a false answer to any of the questions aforesaid, he shall be deemed guilty of an indictable misdemeanour, and shall be punished accordingly," (2 William IV. c. 45, § 58.) The act 5 and 6 William IV. 62, commonly called "The solemn declaration act," which substituted declarations for oaths in a great variety of cases, proceeds on the same principles, and does not leave the taking falsely such declarations, to be repressed by the force of the common law; but assuming them to be beyond the reach of the common law, it expressly provides, that the offence of falsely declaring, shall be "an indictable misdemeanour."

The Irish act declares the false swearing to amount to perjury; the English act re-enacts and keeps in force the former law; and further, declares the false declaration to be "an indictable misdemeanour;" the Scottish act repeals the former law,—has no clause similar to those in the other acts,—and creates no statutory offence. But it is laid down as undoubted law, and supported by several decisions, that the false taking of an oath, prescribed by statute, is not on that account perjury, but requires to be so created and declared by the statute in order to render it indictable. In the last edition of Blackstone, there is a note by Mr. Christian to the following effect:—"Where an oath is required "by an act of Parliament, but not in a judicial proceeding, "the breach of that oath does not seem to amount to per-"jury, unless the statute enacts that such oath, when false, "shall be perjury, or shall subject the offender to the pen-

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" alties of perjury." (Blackstone, Ryland's edition, Vol. iv. p. 137. The penalties of a statute cannot be extended beyond their specific terms, and if a statute contains *no* penalty, it cannot be implied. (See the case of the Duchess of Argyll *v.* M'Neil, 16th June, 1727; 2 Kames, 320. Holmes *v.* Reid, March 4, 1823; Shaw and Dunlop.)

It may be said that the offence charged in the Indictment, is one which ought to be repressed, and which, by some means or other, must be brought within the reach of the law; and undoubtedly the crime is one of a serious nature, and one which, if permitted to pass unpunished, would produce consequences equally injurious to the moral welfare of society, and to the safe and constitutional working of the reformed representative system. But it does not follow, that the crime is beyond the reach of the law, merely because it is here irrelevantly charged, or because it is not indictable in the form adopted by the public Prosecutor. If a false oath, even in an extra-judicial proceeding, be used to defraud or injure another, then it is punishable, not as a separate offence, but as a step in the commission of an act of fraud or injustice; the offence is reached, and the offender is punished by the law, for the specific crime in the perpretation of which he makes use of the false oath; and the act of false swearing is set forth and proved as the *modus operandi*. The analogy of the case of forgery is obvious; the act of forging without using is not an indictable offence, the using or attempting to use the forged subscription is absolutely necessary to bring it within the reach of the law, (Alison, Vol. i. p. 402.) The act of false swearing would in like manner not be an indictable offence, if it were not for the great evil to society from false oaths in judicial proceedings; and in cases where this evil does not arise, and the force of statute does not interfere, the mere act of swearing without using a false oath, ought by parity of reasoning, to be no more an indictable crime than the act of forging, without using, a false and counterfeit subscription. If the libel had relevantly set forth the using of the false oath or declaration

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in defraud of any of the lieges, there can be no doubt that this act of fraud could have been competently punished. Even if it could not have been charged under any recognised *nomen juris*, it might on the authority of some old cases referred to by Sir George M'Kenzie, have been indicted as stellionate; as an act of dishonesty and direct injury, it would be a public crime calling for the interference of the law, and M'Kenzie says, "*Ubicunque titulus criminis de-*"*ficit, illic stellionatum objiciemus.*" But there are several precedents for libelling such an offence under the head of falsehood and fraud. Thus in the cases of Munro and Macfarlane, 20th March 1809, and Alexander Kinnaird, Aberdeen, autumn 1810, (Hume, i. p. 174; Alison, i. p. 364,) false swearing was charged and proved, as a step in the perpetration of the crime of fraud; and if the pannel had in the present instance been indicted for fraud, the public Prosecutor could have proved the taking the false oath or declaration, as the means which he adopted to complete the criminal act. In the very recent case of Speirs Branks and Aitken, (Swinton, Vol. i. p. 163,) the libel contained alternative charges of perjury, and falsehood, fraud, and wilful imposition, especially when committed by means of false certificates and oaths or affidavits. The first charge of perjury "more particularly the knowingly, wilfully, and "feloniously swearing a false oath or affidavit before a ma-"gistrate," was, after some discussion, found irrelevant, but no objection to the relevancy of the second charge of falsehood and fraud, committed by means of false oaths or affidavits, was taken by the very able and experienced criminal lawyer, who conducted that case on the part of the prisoners. In like manner, the false oaths already alluded to, as held in England not to amount to perjury, are not therefore placed beyond the reach of the law, but if used for a fraudulent or illegal purpose, are indictable and punishable as misdemeanours, (case of the King *v.* Foster, Russel and Ryland, p. 459; Chitty's Criminal Law, Vol. iii. p. 713; Omealy *v.* Newall, East, Vol. v. p. 364.)

The case of Overton, quoted by the Prosecutor, (Rose's Bankruptcy Reports, Vol. ii. p. 257,) proves no more than

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that the *using* of a false affidavit in a proceeding in bankruptcy, by founding on it a petition to stay certificate, is an indictable offence; and it is plain that if the affidavit be not filed or *used* in the suit, the mere act of emitting it does not constitute the offence there referred to.

The other case of De Beauvoir, (Carrington and Payne, Vol. vii. p. 17,) certainly seems, at first sight, to touch the question more nearly; but it is to be observed, (1) that probably owing to the rank and situation of Sir John De Beauvoir, who was acquitted by the Jury, and had no desire to avoid a trial, the point of relevancy was not raised by his counsel, or brought under the particular consideration of the Court. (2) The oath taken under the act of Queen Anne, is required to be certified to the High Court of Chancery, or the Queen's Bench, within three months, and is therefore more of a judicial nature, and more closely assimilated to oaths taken on commission, and reported to a court of law, than is the oath in this case, of which there is no record, and which was taken in proceedings purely ministerial; the judicial character and authority of the court to which the oath must be certified, is fairly held as attaching to the proceedings under which it is taken. (3) The *obiter dictum* of a single Judge, (for, as the point of relevancy was not raised by the defendant, there can not be said to be any decision of the point), is not conclusive; and it is plain that false oaths or declarations, when not indictable as perjury, are not generally viewed as misdemeanours at common law, because if they were, the common law would be left to repress them; whereas, since the decision in De Beauvoir's case, they were made indictable as misdemeanours by force of statute, proving that the legislature considered the common law inadequate to their suppression. (5 and 6 William IV. c. 62.)

But it is said that the pannel is guilty of a breach of an act of Parliament, and that that is an indictable offence. This argument is much pressed by the prosecutor, but it proceeds upon an assumption of the first and most important of its premises; for the act charged is not proved

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to be *a breach* of the statute, and, in point of fact, is not so. The pannel readily admits that every direct violation of public law is punishable. The power in the civil magistrate of enforcing submission by punishing transgressors, is absolutely necessary, and forms the essential sanction of the law; but there must be, in every act of Parliament claiming that sanction, words of direct enactment, or distinct prohibition. Every claim of enrolment in the preparing, lodging, or transmitting of which the requirements or the act are not strictly followed, may be termed a breach of the statute, but the loss of the vote is the utmost penalty to the claimant; and on the officer entrusted with the administration of the act a statutory pecuniary penalty is imposed for wilful contravention of its provisions. (2 and 3 Will. IV. c. 65, sec. 38.) In order to constitute a crime, there must be more than a departure from the provisions, there must be resistance to the authority of the law; there must be an unlawful and disobedient act, something done which has been prohibited, or at least something neglected which has been clearly and specifically commanded. On the objections urged by the prosecutor against the competency of charging this offence as falsehood, fraud, and wilful imposition, the pannel shall conclude by offering one word of remark. He is not bound to maintain the propriety of such a mode of proceeding, because the remedy is with the legislature, and the only question now is, whether the Indictment, as laid, is relevant; but he does not think it is attended with any very formidable difficulties—certainly none so serious as those which beset the prosecutor in this case. The assumption of a false character, and the using of a false document, is a fraud, (Alison, Vol. i. p. 362,) and, in some cases, the taking of a false oath as a means of sustaining the false character, has been punished under an indictment charging that offence, (Hume, 1, 174. Alison, Vol. i. 364). But the prosecutor has made it part of his case, that the pannel assumed a character and qualification to which he had no right, that he supported that character by emitting a false oath or de-

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claration, and that by so doing he defrauded the candidate and the electors against whom he gave his vote. This is his case in argument; and, if it had been his case on his Indictment, it would just have amounted to a charge of fraud. But he has framed the libel otherwise; there is no *charge* of assuming a false character—of using a false oath or declaration, of defrauding or attempting to defraud any one. It does not appear in the major proposition, and, therefore, cannot be competently gathered from the Indictment, that any vote was given, or any use made of the false oath or declaration. The act of swearing or declaring stands alone as the sole offence here libelled; it is not in the proper terms, or fortified by the proper sanction of an oath; it is not in a judicial proceeding; it is not cognizable at common law as a substantive crime; and it is not created an offence by the force of statute.

The case came to be advised this day, when the following opinions were delivered:—

LORD MACKENZIE.—The question has been very ably argued on both sides, and, on considering these arguments, I am of opinion that the Indictment is relevant. The charge is, "the wickedly, wilfully, and knowingly "swearing, or making falsely and fraudulently an oath "or a declaration, by Act of Parliament ordained to be "taken or made, on due requisition, as the condition of "exercising the right of voting in the election of a member "to serve in the Commons House of Parliament." I certainly cannot entertain much doubt, that this is, by the law of Scotland, criminal and penal. If I were to look no farther than to our recent decision in the case of Greenhuff and others, (*ante* p. 236), I must hold this to be the case. We there decided, that in order to render any act a point of dittay, it is not necessary that it shall have been previously punished, if it is recognised and fixed to be immoral and dangerous to society. And we cannot doubt that a party is guilty of an act of great immorality, and one which is in the highest degree danger-

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ous to society when, so far as he can, he throws into confusion the provisions made for the formation of the Legislature of this country. But further, the act charged against the pannel is, the taking a false oath or declaration. I am not now going to say, that the oath is of such a nature, as to establish against a party taking it falsely the full crime of perjury, and to involve him in the consequences of that crime, one of which is infamy. But the statute calls what was here done the taking of an oath—it ordains a party, in the circumstances in which the pannel was placed, to *swear*, and it is charged in the Indictment that the pannel *did* swear. It is said that the oath contains no appeal to the Deity. This may make a difference; but it still remains an oath. The only meaning of the word to *swear* has been, since the origin ot language, to take an oath by God. When a man says, "I solemnly swear," he certainly takes an oath. And if the form of words prescribed by the statute be an oath, then the taking it falsely, although it may not constitute the full crime of perjury, is an offence of the same nature, containing the same falsehood, productive of the same injury to man, and evincing the same contempt for Almighty God. It may be that it is not a *judicial* oath in the full sense of the word. But it is an oath taken before a magistrate, on a solemn occasion. And the same principle of law which punishes perjury, must punish this crime, though perhaps in a less degree.

But the case does not stop here. For there is not only an oath taken, and that in a solemn proceeding; there is also a wrong done. The object of the oath is to invest the party taking it with a right to vote in the election then going on. It is not stated in the major proposition of the Indictment, that the oath was used. And this, therefore, though set forth in the minor, cannot be taken as of the essence of the offence charged. But as the charge is laid, the pannel is accused of obtaining, by a false oath, an important and valuable right for himself, and to the prejudice of others who claimed the same

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right. If an offence of this nature is to go unpunished, the Reform Act will be wholly nugatory. For the oath or declaration is the only safeguard against persons who may have lost their qualifications continuing to vote. In all these circumstances, I cannot hold, that in a system of law like ours, there can be any doubt of the relevancy of this Indictment.

LORD MONCREIFF.—We are not asked to view this as a case of perjury, and therefore there is much of the able argument for the pannel which we are not called on to consider. But it is necessary, with a view to other cases, to guard the implied admission, that the crime here charged is not perjury, against misconstruction. It is said not to be so for two reasons; 1st. because the *formula* prescribed is not such as to constitute an oath in law; and, 2d. because the proceeding is not judicial, and it is not declared by the statute to infer perjury if falsely taken. I think it is enough to rest on the first of these grounds—that the words bearing no appeal to the Deity, do not constitute an oath in a legal sense to infer perjury, without express declaration. I would rather avoid saying what might have been the effect, if the *formula* had contained the proper words; because I am not prepared to lay it down, that a proper oath, if prescribed by such an act of Parliament, to be administered by the Sheriff of the county, in the solemn and important proceeding of the election of a member to serve in Parliament, might not be adjudged to be perjury. The Sheriff is said not to be acting judicially. That may admit of doubt. But supposing it to be so, might it not deserve to be considered, whether he does not act as a commissioner of parliament, with reference to the constitution of the Commons' House, as a similar oath might be administered in Parliament itself? I do not say it would be so. I only mean to reserve my opinion, if such a case should arise. As the case stands, there is no charge of perjury. The charge is, that the pannel did falsely and *fraudulently* swear in the terms prescribed, as the condition of his exercising the right of

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voting. It does not appear to me that there is any thing incorrect in the laying of the minor proposition with relation to that charge. For the fact of the pannel *actually voting*, though not involved in the substantive charge in the major, is perfectly relevant to instruct that the oath being taken *falsely*, was also taken *fraudulently*, in order to overcome the *condition* referred to in the major, without fulfilling which he could not exercise the right of voting. Then the question is, whether the swearing or declaring in such terms falsely, and with such a fraudulent purpose, in contempt and defraud of the whole object and design of the statute, is an offence at common law, or not. It is ably argued, that the statute has not made it a crime, and has not even in express words prohibited the taking of the oath falsely. But it being perfectly apparent, that the statute, in prescribing the oath or declaration, relied on it as a safeguard against the abuse contemplated, of a man presuming to exercise the franchise, when he knew that he did not possess it, the law looking at the important transaction, on account of which it is prescribed, will without difficulty infer, that the administration and uttering of such a *formula* could furnish no safeguard at all, except on the assumption that it should be spoken truly and honestly, and consequently, that the swearing or declaring in such terms falsely and fraudulently, must be subversive of the whole purposes of the statute, and specially an act of contempt of the provision which required it to be taken. Whether the facts alleged in the minor proposition, might form the subject of an Indictment, as for falsehood, fraud, and wilful imposition, may be matter of doubt. For though there is certainly falsehood, and fraud in the falsehood, no one may be deceived or imposed on by the daring impudence of the false asseveration, and it is justly remarked as a peculiarity in the case, that the fraudulent object may be accomplished, although the falsehood is perfectly known to all the parties, and even to the Sheriff himself. This is what throws upon the oath or declaration itself a peculiar solemnity

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and importance. Now, in the very able argument for the pannel, which I have considered with great care, and which sometimes I own made a temporary impression on me, what we are required to hold is, that the daring assumption of a false character, sustained by the deliberate swearing or declaring to a known falsehood, and that in the face of the electors and the Sheriff, engaged in the important duty of returning a member to Parliament, and for the purpose of defeating the rights of free election, is actually no indictable offence at all by the law of Scotland. On the best consideration I can give to the subject, I cannot think so. I see that in the law of England, and independent of the express words of any statute, though altogether a new case, they have had no difficulty in holding it to be at common law a high misdemeanour, liable to serious punishment; as is expressly laid down by Lord Tenterden in the case of Mudie, and by Lord Denman in the case of Sir John De Beauvoir, which last cannot be distinguished from the present case. The idea of its not having authority, because there was no argument on the relevancy, proceeds on a mistake, it not being the practice in England to argue criminal cases in that manner. The points, if thought tenable, would have been raised on the trial, and, if necessary, reserved for the opinion of the Judges, without at all impeding the issue of the verdict, and might have been moved in arrest of judgment, if there had been a conviction. But no such doubt appears to have been raised. And the charge of Lord Denman has all the authority of undisputed law.

In the law of Scotland we have not the broad name of a misdemeanour, to cover any such case. But we have the strength of a common law, at least as comprehensive. I conceive that the case, as set forth in the major proposition, is just a species of the *crimen falsi*, new in the special facts, no doubt, because the statute which gives rise to the act is new in its object and provisions, but perfectly in unison with many old and established examples of it, and indeed no way different from a very ancient modification

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of it in the Digest, (Lib. 48. Tit. 10, § 23.) "*Falsi nominis vel cognominis adseveratio pœna falsi coercetur.*" An objection is taken for the pannel to the *formula* prescribed by the statute being called an *oath*. But that is merely a description of the *formula*, which description is taken from the statute. Besides, it is called an oath or *declaration*; and though not an oath to infer perjury, it is an oath or declaration of a certain character created by statute. Upon all these grounds, I have come to be of opinion that the Indictment is relevant. Perhaps it may be thought that it would be better, if we could come to a different conclusion, as ensuring more certainly a more effectual remedy for a manifest evil. With this we have no concern. Yet it may not be wrong simply to say, that even if the Indictment be found relevant, there is much cause for the interference of the legislature, to put the matter on a clearer and firmer footing.

LORD MEDWYN.—I fully concur in the observation, that it would be well if this crime were put on a different footing, and perhaps brought under a higher scale of punishment. But I have no difficulty in holding that the *species facti* charged against the pannel constitutes an indictable offence. My only doubt has been, whether the Indictment would not have been more correct, if it had borne in the major proposition, that the oath was made use of, and a party thereby injured. In two offences recently introduced into our law,—namely, furious driving, and recklessly steering vessels—the major proposition invariably states an injury to have been committed. At the same time, the facts set forth in the minor proposition of this Indictment, might competently be proved under the word "fraudulently" in the major. And the doubt which I felt on the subject was probably ill founded, since it has not occurred to any of your Lordships.

LORD COCKBURN.—There are two separate questions here, 1st, Whether the act constitutes an indictable offence; 2. Whether, if it does, it has been properly charged. I am

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very little moved upon the first of these points, by the authorities that have been referred to in the law of England. I doubt if we understand them; and they proceed on maxims to which our law is a stranger. Mr. Russell, in his work on Crimes, explains the principle of the law of England to be, that "wherever a statute *commands a* "*matter of public convenience*," the offender against the act may be proceeded against by indictment, "*for his con-*" *tempt of the statute*;" and he gives the *not repairing a street* as an example of this. I am not aware that we acknowledge any such principle. On the contrary, there are many statutes commanding what is not merely for public *convenience*, but for high public concernment, such as the protection of commerce or the revenue, the infringement of which we would never think of indicting in this Court. But, drawing only from our own system, I cannot doubt, that what is here set forth, is indictable.

In order to arrive at this conclusion, I feel it to be scarcely necessary to look beyond the mere fraud which is implied in the act charged. The prisoner wished to possess something valuable. It happened to be a right to vote at a parliamentary election;—but it is immaterial what it was. It was something he wished to have, but which he had no right to, except as the occupier of a shop; and which others had a right to prevent his obtaining, without this occupancy; and in order to obtain it, he, when lawfully required by the Sheriff to declare how the fact stood, is said to have represented the shop to be still in his possession, though he knew this to be false; the effect of which is said to have been, that he secured his own object, and defrauded others of theirs. Suppose that the statute had not prescribed any oath, or any declaration, but had simply stated that no person should be entitled to vote who had lost the premises on which he had been enrolled, and that the fact might competently be put to the conscience of the claimant; and that a Sheriff and rival electors had been purposely deceived by a claimant *merely asserting*, but with conscious falsehood, that he still retained

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the property. I can not discover any ground on which it could be doubted, that this was a serious fraud, and therefore indictable in some form or other. The nature of the interest,—whether money or a privilege,—for the purpose of obtaining which the imposition is practised, is not essential to the constitution of the crime.

But, independently of fraud, I hold it to be clear that the feloniously taking a false oath, or declaration, in violation of a public statute, is a crime by the common law of Scotland. It may not be perjury; but it is not innocent. It is an offence. I don't mean that it *may* be now declared to be an offence, in virtue of any supposed inherent power in this Court to introduce new crimes; but it already actually is an offence, and that because it *comes within the range of old and established criminal principles. Perjury* is a crime at common law. There are statutes which refer to it, but always as a thing previously understood to be criminal; and it was not originally a purely statutory offence. Now though the specific act charged here, occurred in the course of executing a modern statute, it is included, in principle, within all the grounds, except the profanity of the false appeal to the Deity, on which the common law denounces perjury. There is the same wickedness,—the same deceptive invasion of the rights of others,—the same obstruction and contamination of legal proceedings, by the solemn asseveration of falsehood by a person bound to speak the truth. So clear is this, that the legislature itself often relies upon it. For the legislature, though it sometimes abstains from declaring the falsely taking of a prescribed oath and declaration, to be perjury, does nevertheless appoint it to be taken truly; an appointment which would be inept, were it not that the *implied penalty of the common law* is trusted to. In short, the act before us may in truth be described, as perjury in substance, though not in form.

2. As to the *form of the charge*, I see nothing objectionable in it. I rather differ from the Prosecutor in this respect, that I think the act might have been stated as a

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fraud. But the course that has been adopted, is better; because it discloses the exact offence really meant to be prosecuted. There was perhaps no absolute necessity for setting forth, in the major proposition, that the declaration was made in the course of the elective, or of any other process. It might have been enough to state, that it was a declaration which a statute required to be taken truly. But this unnecessary fulness of disclosure cannot make the libel irrelevant. The prisoner argues, that as, strictly speaking, there was no oath, that part at least of the major proposition, which applies to the taking of an oath, cannot be sustained.—But this proceeds on the mistake that the Prosecutor uses the word *oath* in its usual and correct legal sense: whereas, it is plain that he only employs it in the sense in which it is employed in the statute, as descriptive of the particular thing that occurred here,—and besides, though this be not an oath, the violation of which implies perjury, I am not satisfied that it is not an oath of any kind whatever.

It is also maintained for the pannel, that that part of the minor proposition which relates to the actually voting, is irrelevant, and unconnected with the major. I do not think so. Because as the major sets forth, (unnecessarily, as I think, but certainly competently), that the declaration was indispensable as the condition of voting, the prosecutor had a right to introduce the fact into his exposition of the circumstances, in support of his general averment. The fact of voting may also be very material, in reference to the criminality of purpose by which the prisoner was actuated. I cannot conclude without adding, that it is surely worthy of the consideration of the legislature, whether it would not be proper, either to amend the form of the oath, or to enact that the wilful violation of the oath, as it is, should be perjury.

LORD MEADOWBANK.—I have considered the Informations with all the attention in my power, and the opinion which I have formed decidedly concurs with that of all your Lordships.

The Court accordingly repelled the objections to the relevancy of the Indictment, and, on the motion of the Lord Advocate, deserted the diet against the pannel, *pro loco et tempore*.

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Taking a False Oath.

Present,

Lords Meadowbank, Medwyn, Cockburn.

Jan. 28 1839.

Her Majesty's Advocate—*Sol.-Gen. Rutherfurd—Davidson.*

AGAINST

Robert Michie.—*Swinton.*

Theft.—A boy in the employment of a Bookseller, who appropriated to his own use a bank note delivered to him by his master, in order that he might get it changed, and return with, and deliver the change to him, found guilty of theft, and sentenced to twelve months imprisonment.

Robert Michie was charged alternatively with Breach of Trust and Embezzlement, or Theft :[1]

No. 51. Robert Michie.

Theft.

In so far as, on the 4th of October 1838, James Laurie, Librarian and Bookseller, residing in Frederick street, Edinburgh, having, within the shop situated in Frederick street aforesaid, occupied by him, entrusted the said Robert Michie, then in his employment, with, and delivered to him a bank or banker's note for L.20. sterling, the property or in the lawful possession of the said James Laurie, in order that he might get the same changed, and return with, and deliver the change thereof to the said James Laurie, the said Robert Michie did, time and place above libelled, or at some other time and place to the Prosecutor unknown, wickedly and feloniously, and in breach of the trust reposed in him as aforesaid, embezzle the said bank or banker's notes for L.20 sterling, and did appropriate the same to his own uses and purposes : or otherwise, the said James Laurie, having, time and place above libelled, delivered to the said Robert Michie, a bank or banker's note for L.20 sterling, in order that he might get the same changed, and return with, and deliver the change thereof to the said James Laurie,

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[1] The pannel had been originally charged with Breach of Trust only, but, at the suggestion of the Court, the diet against him was deserted, and a new Indictment prepared.

No. 51. Robert Michie, Jan. 28 1839.

the said Robert Michie did, then and there, or at some other time and place to the Prosecutor unknown, wickedly and feloniously steal, and theftuously away take the said bank or banker's note for L.20 sterling, the property or in the lawful possession of the said James Laurie.

Theft.

The pannel offered to plead guilty of the charge of Breach of Trust and Embezzlement, contained in the Indictment.

The SOLICITOR-GENERAL, for the prosecution, refused to accept this plea, and insisted for an interlocutor of relevancy, on the charge of Theft.

SWINTON, for the pannel, objected, that the *species facti* libelled amounted only to the crime of breach of trust. The distinctions between that crime and theft were fully considered in the recent case of Hugh Climie, May 21 1838, (Swinton, Vol. ii. p. 118,) in which the appropriation by a servant, of money received from his employer for the purpose of paying it to third parties, was found to be breach of trust, not theft, on this ground, that it was not set forth that the money was to be delivered by him in *forma specifica*. The same objection occurs to the present Indictment. The money was delivered "not "sealed up, but open," (Alison, vol. i. p. 358,) and it is not even said that the pannel was to return *immediately* with the change, (opinion of Lord Medwyn in Climie's case, Swinton, p. 127.) The case of Climie is valuable in another respect, as furnishing all the precedents on the point which the counsel on either side could discover. And two of the cases quoted for the pannel,—those, namely, of Daniel Pratley, (Glasgow, September 14 1836) and William Robert Young, (High Court, June 5 1837) are express authorities on the present question.

The SOLICITOR-GENERAL, for the prosecution, referred to the cases of Duncan M'Intosh, February 2 1835, (Shaw and Dunlop, Vol. xiii. p. 1168,) and David Field, Jan. 22 1838. (Swinton, Vol. ii. p. 24.) The case of Pratley is of no authority, as the point was not raised, and the pannel pleaded guilty. And the same remark applies to that

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of Young, in which, moreover, the pannel was charged with embezzling—not the draft—but the money which he had drawn from the Bank.

LORD MEDWYN.—It is unquestionably sometimes difficult to draw a distinction between the crimes of theft and breach of trust. But the rule has been laid down, that when the owner of money delivers it to another, in order that it may be paid *in forma specifica* to a third party, the appropriation is theft; if, again, the depositary is merely to account for the money given him, the crime is breach of trust. In the present case the L.20 note remained the property of Lawrie, and was merely delivered to the pannel "for a temporary and transient purpose," (Alison, Vol. i. p. 250), for although it is not said that he was to return *immediately* with the change, it is quite evident that that was intended. I have no hesitation in holding that the Indictment contains a relevant charge of theft.

LORD COCKBURN.—I perfectly concur. I was of opinion, even in the case of Climie, that the charge amounted to theft, and I am decidedly of the same opinion here. If the pannel had received from his master money, to use for the general purposes of the shop, and had been told, whenever he required change to get, it—and if he had in these circumstances changed some of the money and appropriated it, his crime would have been breach of trust. The case would even have been different, if he had got the L.20 note changed, and then kept the change. But as the charge of theft is laid, I can have no doubt of its relevancy.

LORD MEADOWBANK having expressed his concurrence, the Indictment was found relevant to infer the crime of theft.

The pannel pleaded not guilty, and a proof was led. It appeared that the pannel, a boy about fourteen years of age, received from his master a L.20 note, with instructions to get it changed at the Commercial Bank, and return to him immediately with the change. He called

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shortly afterwards on a companion, to whom he shewed one note for L.10, and two others for L.5 each, which he represented himself to have received for Mr Lawrie and his brother. The two boys absconded together with the money, and were subsequently apprehended in England.

THE SOLICITOR-GENERAL, for the prosecution, argued, that the crime of theft was clearly established against the pannel.

SWINTON, for the pannel, answered,—There is no evidence, nor even any presumption, that the felonious design of appropriation was formed before the L.20 note was changed. If the pannel first honestly procured the change, and then, tempted by the opportunity, appropriated it, he cannot be convicted of the theft of the L.20 note, which is now the only crime charged.

LORD MEADOWBANK charged the jury, observing, that the supposition of the felonious design having been formed subsequently to the changing of the L.20 note, was disproved by the description of the notes exhibited by the pannel to his companion, which were not such as his master probably wished to receive.

The Jury unanimously found the pannel guilty of stealing from his master twenty pounds sterling, by appropriating a twenty pound note to his own use, but on account of his youth, recommended him to the leniency of the Court.

In respect of which verdict of Assize, he was sentenced to be imprisoned in the Bridewell of Edinburgh, for the period of twelve calendar months.

Present,

Feb. 25
1839.

LORDS MONCREIFF, MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Rutherfurd—Innes.*

AGAINST

ARTHUR WOODS, AND HENRIETTA YOUNG OR WOODS—*Neaves—Henderson.*

MURDER—EVIDENCE.—1. Circumstances in which on the trial of a man and his wife for the murder of the husband's son, by a former marriage, the male pannel was convicted, and the libel against the female found not proven.

2. It is competent in a trial for murder, though no previous malice is libelled, to lead evidence regarding the particulars of a quarrel between the parties a week previous to the commission of the crime.

ARTHUR WOODS and HENRIETTA YOUNG, or WOODS, were charged with Murder:

No. 52.
Arthur and Henrietta Woods.

Murder.

IN SO FAR AS, on the night of the 4th, or morning of the 5th August 1838, within or near to the house in or near Thorter Row of Dundee, then occupied by the said Arthur Woods, the said Arthur Woods and Henrietta Young or Woods did, both and each, or one or other of them, wickedly and feloniously attack and assault John Drew Woods, pedlar, having no fixed residence, son of the said Arthur Woods, and did, with great force and violence, dash or throw him down upon the ground or floor, and did strike him on the head with some blunt instrument to the Prosecutor unknown, or did violently dash or strike his head against the floor or furniture, or some hard substance to the Prosecutor unknown; and did violently twist a rope, or other ligature, round his neck; by all which, or part thereof, his skull was fractured, and he was strangled, and immediately or soon thereafter died, and was thus murdered by the said Arthur Woods and Henrietta Young or Woods, or one or other of them.

HENDERSON, for the pannels, objected to the relevancy of the Indictment, on the ground that the strangulation which was alleged to have been the cause of death, was not explicitly stated to have been occasioned by the pannels.

No. 52. Arthur and Henrietta Woods, Feb. 25 1839.

Murder.

The objection was repelled, and the pannels pleaded not guilty.

EVIDENCE FOR THE PROSECUTION.

JOHN BOYD BAXTER, *Procurator-Fiscal of Forfarshire*, proved the pannels' declarations.

Cross-examined by NEAVES *for the pannels.*—I know that the trial was postponed in October, in consequence of the pregnancy of the female pannel. She was delivered in Jail, about a month after the Perth Circuit.

JOHN IRVING HENDERSON, *Sheriff-Substitute of Forfarshire*, also proved the declarations.

DUNCAN M'NAB, *night watchman of the Dundee police.*—I was on duty in Thorter Row, of Dundee, on the night of Saturday, the 4th of August. I know the pannels' house, and had occasion to pass and repass it in the course of my beat. It is in a close which enters into Thorter Row. About a quarter past one I heard a noise as of people fighting within the house. I thought some people were drunk and others trying to pacify them. I heard no words, but a sound as if feet working on the floor. About twenty minutes afterwards I returned, and went into the Court, where I saw a dead man lying. The body was lying on its back, close to the stair which comes down from the pannels' house. It is an outside stair at the end of the house. The body was opposite the landing-place at the top of the stair. The stair is seven or eight steps in height. There is a railing about three feet high on the outside of the steps, and round the landing place. The head of the body was towards the entry of the Court, and the feet next the side of the stair, about eighteen inches distant from the stair. The body was straight, except that the knees were bent. I thought it was a man asleep, or drunk, but went and handled the body, and then found he was dead. I did not know the man. It was dark, but I had my lantern. There was a man coming through the Court, whose name is Annal. I left him in charge of the body while I went to the Police Office. Peter Forbes, the night patrol, came back with me to the Court. We found Annal still there, and the body lying as I had left it. I went a second time to the Police Office, and got a barrow. Serjeant Low came back with me. He recognised the body, and it was then taken on the barrow to the Police Office. Before we removed it, Low went into the pannels' house, but I did not accompany him. About half-past twelve o'clock that night I saw a man come out from Summers' back-door, in the Court, and knock at the door of the pannels' house. I think that was the same man whom I afterwards found dead. I did not see the door opened, but I left him standing before it. I saw the

male pannel about twelve o'clock, in the Court, going towards his own house.

Cross-examined by NEAVES *for the pannels.*—There are three taverns with back-doors into the Court, Wright's, Summers' and Anderson's. There were very few people going about the Court that night. I never saw it so quiet.

GEORGE MATHEWSON, *architect in Dundee*, proved the plan of the *locus delicti* libelled on. The Court is about six yards wide. The lower step of the stair is almost opposite the entrance to the Court. There is a stair-case on the right hand side of the Court leading to Mrs. Easson or Scott's house. From that staircase to the stair of the pannels' house is 15 feet.

WILLIAM ANNAL, *tailor in Dundee.*—I remember spending a part of the night of Saturday the 4th of August in Wright's tavern, which has a door leading into a court off Thorter Row. I left the tavern to go home between one and two o'clock. In the court I found M'Nab the watchman, and a body. I examined the body, and found it dead. I put my hand to the pulse, and down the breast. There was no motion, but the body was warm. I remained with the body till the policeman returned with other men, and removed the body, on a barrow, to the police office. I did not alter its position while I remained there alone. The body was lying on its back, at the foot of an outer stair, the feet pointing towards the stair, and the head towards the mouth of the court. It was near the lowest step of the stair, but the feet were opposite the landing place of the stair.

By the COURT.—The court is paved with flag stones.

JAMES LOW, *serjeant of the Dundee police.*—I remember, on the night of the 4th of August, receiving from M'Nab a report of a dead body being found. I sent Peter Forbes along with him, and afterwards went myself with a barrow. We went into a paved court off Thorter Row, where we found a body lying on its back, with the head towards the entry of the court, and the feet towards an outer stair that projects from the wall of a house. By the light of the watchmen's lanterns I recognised the body to be that of John Woods, pedlar, the pannels' son. On doing so, I went and knocked at the door of the pannels' house. The door was fastened. The male pannel opened it. I found both pannels in the house, and an infant child about two years old, and no one else. The male pannel had a white hat on; and, I think, all his clothes except his coat. When I got in, I asked him where was John, meaning his son. He said, "I do not know; he is not here, he shan't be here." I turned away from him, and asked the female pannel if she knew where John was? She said she did not know. I asked her where she had seen him last, and I think she said he had been at the outside of the door about half an hour before, and that his father would not let him in. I asked where she thought he might have gone. She said she could not

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tell, but she thought she heard him fall over the stair. I asked the father if he knew anything of this. I think his answer was, "It was not me that did it," or words to that effect. We had the body removed to the police office. I left Peter Forbes in charge of the pannels. He was present when I was questioning them. When we got to the police office I sent for Dr. Webster, who came immediately and examined the body. It was then between two and three o'clock. The body was then precisely in the condition in which it was found. I went back to the pannels' house, and brought from thence a number of pieces of rope, which I found in an open press or pantry. I observed, on the neck of the body, a red mark, and some parts of it indented, as if a cord had been drawn tight round the neck. On the Sunday forenoon Dr. Moon examined the body, which was still in the same state.

By the COURT.—There was a child in the house when we went back. There was no one else in the house. The female pannel was present when I found the ropes. I do not recollect that she made any observation. The thickest rope was hanging on a nail behind the door of the pantry, and the others were lying on the floor, at the foot of a table in the pantry.

By INNES.—I applied two of the smaller ropes to the indented marks on the neck of the deceased, and found it exactly to correspond. Dr. Webster was present at this time. It was applied again in Dr. Moon's presence.

PETER FORBES, *one of the night patrol in the Dundee police*,—corroborated the evidence of Duncan M'Nab. The body was still warm when I saw it, but quite dead. I knew it to be John Woods, the male pannel's son by a former marriage. I went with Low into the pannels' house, where we found both pannels and an infant child, no one else. The male pannel was walking about the floor with a hat on, and all his clothes except his coat. His wife was toasting oatcakes at the fire. She also was fully dressed. Low asked if John was in. The male pannel said no, he was not there, and should not be there, and swore. The female pannel said he had been at the door, about half an hour before, asking in, but was refused, and that he had then asked for the key of the cellar, where he had slept for the two previous nights, but that his father would not allow him to get it. She said also that she thought she heard him fall over the stair. Low asked the father if he knew anything of that—if he pushed him over the stair. The male pannel said, "No, but I caused another to do it;" Low asked who that was, and he said he did not know. I was left in charge of the pannels. Some ropes were afterwards taken from the house. *(Identifies the ropes libelled on.)*

By the COURT.—The male pannel was rather the worse of liquor, but could walk as well as I could, and understood what he was saying. The woman was quite sober.

MARGARET LINDSAY or SUMMERS, *wife of George Summers, public-house keeper in Dundee.*—My house has a door opening into the same

court as the pannels' house. I remember, on the night of the 4th of August, at about half past twelve, after the house was shut up, some one coming and knocking. I asked who was there, the person said it was Johnny Woods, and I thought the voice was that of the pannels' son, whom I had known for many years. I did not let him in, and did not see him at all. He asked for a glass of whiskey, but I gave him none.

Cross-examined by NEAVES, *for the pannels.*—The pannels have only one child about three years old. They have lived in the close ever since they were married.

By the COURT.—The pannels' son, John, was a man of middling size and strength. When he spoke to me through the door, I thought he was in drink.

AGNES HENDERSON or MITCHELL, *widow, residing in Overgate street of Dundee.*—I keep the Wright's Tavern, which has a door into the court where the pannels live. I have known them for some time. I know that the male pannel had a son by a former marriage. I saw him twice in his father's house. I remember, on a Saturday, about a week before his death, hearing——

NEAVES, for the pannels, objected to evidence being received of any particular circumstance unconnected with the crime charged. In regard to the statements in the pannels' declaration, which this examination may be intended to contradict, the prosecutor cannot, by putting questions to the pannel when under examination, make that evidence which is not evidence.

INNES, for the prosecution, answered, that the examination proposed was competent, not to prove a crime not charged, but to show the state in which the parties lived together, and the probable cause of quarrel.

THE COURT held, that it was competent to lead evidence of what took place so recently as the week before.

THE WITNESS.—On the occasion to which I have referred, I heard a noise as of a quarrel, and on going to the house, I found the male pannel and his son struggling, and shaking each other *through* the floor. His wife was standing bye quite unconcerned. Whilst they were struggling they fell over a small tub. The son before that had had the better of the father, but the father then got uppermost. They were not striking each other. This was between six and seven in the afternoon. I tried to separate them, but failed, and called to Andrew Mill and John Galloway for assistance. They came, and I then left the house.

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By the COURT. There was not a word spoken during the struggle. I could not say whether they were drunk or sober. They were still lying on the ground when I left them.

By NEAVES *for the pannels.* My tavern is directly behind the pannels' house. There is nothing between them but a water-run. I was late up cleaning my house the night on which the body of John Woods was found—till three in the morning. I heard no disturbance in the pannels' house.

By the SOLICITOR-GENERAL.—My house enters both from Overgate street and from the court. I heard no voices in the court that night, nor the sound of a barrow.

By the COURT.—The other time I saw the deceased, in his father's house, was six or eight weeks before.

ANDREW MILL, *sailor, residing in Thorter Row of Dundee.*—My window looks out into the court in which the pannels' house is. On a Saturday night, a week previous to the death of the pannels' son, I heard cries for assistance proceeding from the pannels' house. When I got there I found the male pannel and his son struggling. The pannel was on the top of his son, with his hand on his neckcloth, and his knee on his breast. John Galloway was with me. We interfered and separated them. The wife was present. She wanted to strike the son with the poker, and turn him out of the house. She tried to strike him three times, and in doing so hit me. I could not say whether she was drunk or not. But she was violent, and swore. I did not understand anything of the cause of quarrel. She always swore at the son, and told him to go out. He said he had more right there than she had. I got the young man out of the house, and advised him to leave his father's house altogether. He said he would. He said also that it was always his step-mother's fault that they quarrelled. He did not say how, or what she did. He said nothing about his father or his conduct. I never saw him in life again. I remember the night on which his body was found in the close. My wife and I were at home that night. I heard a noise, as of tumbling about chairs and tables, from the inside of the pannels' house. I said to another man, who was in my house, "that is that body Wood and his son," thinking it was a common quarrel.

By the COURT.—I did not know whether the pannels were married or not.

ISABELLA SHEPHERD or MILL, *wife of the last witness.*—I recollect the night on which a dead body was found in the court, About a quarter past twelve o'clock that night I heard a noise in Wood's house. The door was shut. There was a light in the house. I heard voices of persons quarrelling. I recognised the voices of both the pannels, and of John Woods the male pannel's son. I heard also the noise as of a table or chair drawn along the floor. I heard nothing that was said. On the Saturday before that, I recollect looking over the window, and seeing my husband and Galloway going up the stair to the pannels'

house. Before this I had heard sounds of quarrelling in the pannels' house. I also saw the female pannel push the deceased John Woods down the stair. They were constantly quarrelling since they came to that house, which was a twelvemonth before.

By the COURT.—It was while my husband was going down the stair with John Woods that I saw the female pannel pushing him.

ANN ROSS or M'LEAN, *wife of Angus M'Lean, labourer, residing in Thorter Row, Dundee.*—I knew the pannels and their late son by sight. On the Saturday before the son's death, I heard a scuffle in their house. On the night on which the body was found I had occasion to pass through the court after twelve o'clock. There was then a light in the pannels' house. I was crossing the court, and heard voices, scolding and swearing. I cannot say whose voices they were, or whether the voices of men or women, or how many voices there were. I heard no particular words that I can now remember. I heard quarrelling. I cannot tell what I heard a man say, or what was the sense of it. I did not hear the words, "I'll hang you before I sleep," nor anything like that. I am quite sure I did not hear the word "hang," or the word "sleep." I cannot tell any one word that I heard.

By the COURT.—I did not hear the word "choke," or "strangle." I cannot tell what the words of swearing were.

ANN EASSON OR SCOTT, *wife of George Scott, weaver, residing in Thorter Row, Dundee.*—I live in the same court as the pannels. I knew the late John Woods by sight. He appeared to be 21 or 22 years of age. I never heard of any dispute between him and his father till the week before his death. I remember, on the evening of the previous Saturday, hearing a noise of quarrelling in the pannels' house. It appeared to be a quarrel between the two pannels and the late John Woods. They were all fighting *through other*. I heard the female pannel stamping her foot, and bidding the son go to the door, and heard the son giving her bad language in return. The door was open. I did not see any of them. I did not hear the deceased abuse his father, but I heard him tell his step-mother that the house was his father's as well as hers, and then I heard the father say that he would put an end to his son's existence. On the following Saturday, I recollect, as I came down my stair, (which is the same as the stair to Summers' tavern, and is on the right hand side of the court,) I saw the now deceased John Woods at Summers' door. It was then about half past twelve o'clock. He held my candle for me as I went down the stair. I returned, and found him still there. Mrs. Summers spoke to him through the door, but he did not get in. He asked for whiskey, but did not get it. I went up stairs, and he went up part of his father's stair. He was very *fou*. I did not see him go into his father's house. I went to bed, but did not fall asleep, and rose again to let in a tailor boy who lodged with us. I had previously heard a noise, and when I got up I went to the staircase window, which is four stairs up, looking into the court, and

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directly opposite the pannels' stair. When I got to that window, I ascertained that the noise came from the pannels' house. I heard a cry of murder, like far away, in a faint and low-like tone. I then went down to a window, two floors lower down in the stair case, and put my head out at a broken pane. I heard John Woods say, in a low and mournful tone, " Don't choke me father." This was said only once. There was no other noise, except a scuffling of feet, and the noise as of a table or chair thumping against the floor, and I thought I heard the noise of a person knocking a head on the floor. I thought this at the time, and was consequently more alarmed at this noise than anything. I heard the father's voice reply, " I'll be your butcher before I sleep." I did not hear a third voice at that time. I had heard the female pannel's voice at different times that night, but not speaking angrily. After the words ceased between the pannel and his son, the other noise, as of scuffling and thumping, continued. A policeman came into the court, calling past one. He looked towards the house from which the noise proceeded, and then went away. A little after this the noise stopped. It would then be nearly half past one. I still continued at the window, but heard no noise. As the half hour was *chapping*, I saw the door of the pannels' house open, and the father fetching out the son. I saw this by the light that came from their house. The father had his hands under the oxters of the son, and was pushing him before him. Nobody was with him at first, but afterwards Mrs. Woods came to the door, and went down the stair assisting her husband to carry down his son. She had the feet. They carried the body down the stair between them, and laid it down across the court, with the head towards the entry of the close, and the feet close to the stair. After this they went up the stair and shut the door. I did not hear them say anything to one another. I heard the woman's voice speaking to her husband very low. I could not catch the words, or the meaning of them,—*(after a pause, and having been warned that she must speak out)*—I thought at the time that what the woman said was, that they would not be *fashed* any more. Soon after this some policemen came with a barrow, and the body was removed.

By the SOLICITOR-GENERAL.—The body was carried down the stair head foremost. The father went first, carrying the head, and the woman followed, carrying the feet. The body was laid opposite the landing place. When the door was opened, before the body was brought out, the female pannel looked out. She went in immediately, and then the body was brought out. No one was in the Court when she looked out; but I was at the window, and remained quite still.

Cross-examined by NEAVES *for the pannels.*—About four or five minutes after the pannels went into their house the barrow came. I first told what I had seen that night on the Monday.

By the COURT.—After I saw the body laid down in the Court, I did not do anything. I went away from the window a little after that. I did not suppose that he was dead; having seen him so shortly before drunk,

I thought he was carried away to the Lock-up house on that account. I first heard that he was dead on the Sunday morning about eight o'clock. My husband told me, and I then mentioned to him what I had seen. I was taken to the Procurator-Fiscal's office to be examined on the Tuesday. It was to some of the neighbours that I told what I had seen on the Monday. I had no particular acquaintance with the pannels, though I knew them as living in the same court.

ALEXANDER WEBSTER, *physician in Dundee.*—I was sent for to the Police Office a little after two o'clock on the morning of Sunday the 5th of August, to examine a body, and prepared, along with Mr. Moon, the report libelled on. [The witness here read the report, which stated the principal external appearances on the body to be a puffy tumour about the size of a crown-piece, on the back part of the head, a depressed and discoloured line about a quarter of an inch in breadth, across the upper part of the wind-pipe, and livid marks on the inner side of both arms, and on the left wrist. The lips were slightly livid, and the pupils of both eyes dilated. The skull was fractured, and the lungs slightly congested—and there was found extravasation below the integuments, throughout the whole course of the external line round the neck. The general appearance of the body indicated that the deceased had enjoyed robust health, and the death appeared to have been caused by violence, either the injury on the head, or the tight application of a ligature round the neck being sufficient to produce death. But if the injury of the head proved fatal, some considerable time might have been expected to elapse between the date of the injury and the fatal result, whereas if suffocation was the cause of death, it must have ensued in a few minutes.] When I first saw the body it was warm, and bore marks of very recent death. The tumour outside the head corresponded with the fracture of the skull. That injury must have been caused by a blow, and might very probably be occasioned by knocking the head violently on the floor. The marks on the arms were such as might be caused by the grasp of a finger or thumb, and were quite recent. The mark round the neck did not extend below the left ear. That mark may have been caused by a tight small ligature drawn round the neck. I was shown a piece of rope which was said to have been found in the pannels' house, and on fitting it to the marks on the neck I found it suited. I should be at a loss to account for the mark on the neck in any other way than that I have mentioned. There was nothing in the appearance of the body inconsistent with the supposition of the death having been caused by strangulation. The blow on the head, which produced the fracture and tumour, must have been before the application of the ligature to the neck. The tumour must have been produced during life, though it may have been caused in the course of the struggle. I have heard the whole of the evidence. The state of the head might have been produced by the knocking which was heard the floor. Both injuries were, in my opinion, mortal. But after hear-

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ing the evidence, my impression is that death was brought about by strangulation.

By the COURT.—The appearance of the lips and pupils of the eyes described in the report might have been produced, although death had been caused by the fracture. Supposing the blow on the head not to have produced death, it would still render the deceased insensible, and incapable of resistance. The state of the lungs described in the report is an appearance of death by suffocation.

ADAM MOON, *surgeon in Dundee*, concurred with the preceding witness as to the report libelled on, the nature of the marks on the body, and the probable cause of death. From the absence of any mark on the neck, under the left ear, I should conclude that the rope had been drawn upwards, and strangulation produced in that way.

By the COURT.—The fracture must have been produced during life, and therefore probably before the strangulation. The appearance of the lungs indicated death by strangulation. I cannot say that the dilation of the pupils of the eyes could be assigned to either cause of death.

Two declarations by each of the pannels were then read. Those of Arthur Woods stated, that he had turned his deceased son out of his house on Saturday the 28th of July, and except passing him in the street on the following Wednesday, had not seen him since, and particularly denied that he had either seen him or heard his voice at any time during the night libelled. The pannel, Henrietta Young or Woods, denied in her declarations that she had ever any quarrel with the deceased, or had ever struck or attempted to strike him, but she admitted having had a poker in her hand on the occasion of a quarrel between him and his father, on Saturday the 28th of July. She stated farther, that she had allowed the deceased, without her husband's knowledge, to sleep in the cellar below their house, on the nights of the Thursday and Friday preceding his death—that she saw him also on the Saturday evening, while her husband was out,—that he returned again that night and knocked at the door, asking for the key of the cellar, that he might sleep there again, which his father refused to allow him to do—that he went away without being allowed to enter the house—that about a quarter of an hour afterwards she (the pannel), heard a noise "as if something like a shoe had been thrown

against the iron-railing of the stair," and immediately thereafter the voice of a man as if at the foot of the stair, saying "rise, man," to which she heard the deceased reply, "My God,"—and that immediately after this she heard a bustle in the court, and on looking out of a window saw the policemen and the barrow.

THE SOLICITOR-GENERAL, for the prosecution, argued, that with respect to the male pannel there could be no doubt of his guilt—and with regard to the female, any hesitation which might exist in the minds of the Jury must arise only from feelings of compassion. There is no doubt of the death, or of its having been caused by strangulation. The deceased and his father are proved to have been on bad terms. He is traced to the pannels'. house, in which at the time there is no one except the two pannels, and an infant child. The last words he is heard to utter, "Don't choke me, father,"—accord exactly with what is proved to have been the cause of death, and shortly after this, and the threat of the father, "I'll butcher you before I sleep,"—the body is borne out by the two pannels. There cannot be the least doubt that the son was murdered by his father. And there is nothing in the conjugal relation which, according to the authorities in our law, can free the female pannel from the guilt of having been an accessory to the crime. (Hume, Vol. i. p. 47., Alison, Vol. i. p. 668.) There have been cases in which it has been argued, that the presence of a wife—not participating in the crime, but the trembling and weeping spectator of a deed, which she could not bring herself to interfere to prevent,—did not involve her in the guilt of murder; and able and eloquent advocates have in such circumstances wrung from the weakness of juries a verdict of acquittal. But there are here no such circumstances. The female pannel is herself found, the previous week, inflicting violence on the deceased, striking him with a poker. On the night of the murder she is the only other person in the house—she, as well as her husband, is heard

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quarrelling and swearing. The strangulation, which was the cause of death, cannot have been brought about by one man without assistance—and then there is the expression which she is heard to utter in a low voice, after assisting to carry the body down stairs,—the expression in which she congratulates her husband on the commission of the crime. If the guilt of the pannels is clearly established, the jury have nothing to do with consequences, the responsibility of which lies with the law and the Legislature.

NEAVES, for the pannels, answered,—There is a material difference between the cases of the two pannels. Although it is true that the influence of her husband will not exculpate a wife, if she is clearly proved to have been an accessory in the commission of a crime, it is equally certain that the existence of such influence greatly affects the presumptions, upon which her accession can be established. In the present case, too, the wife may be innocent although the husband is guilty, which is not the case in regard to the male pannel. But, looking first to the case as regards both pannels, there is no proof of any previous preparation —there is an utter absence of any adequate motive—there is no appearance of guilt in the subsequent conduct of the accused. Without the evidence of Mrs. Easson, the prosecutor would have no case. She certainly is corroborated in some respects, but not in many particulars in which corroboration was competent. She describes certain noises which she heard, in an order that does not at all agree with the theory of the medical witnesses. For they say that the strangulation must have followed the fracture; but, according to her evidence, it preceded it. Then she allows the policeman to come into the Court and go away, without informing him of the great alarm which she describes herself as feeling; and her account of the barrow coming for the body in two or three minutes, is wholly contradicted by the evidence of what really took place. Then in regard to the female pannel,—even supposing her husband to be guilty, there is not sufficient

proof against her. Not a vestige of evidence exists of her harbouring previous ill-will against her step-son—the allegation of the deceased to one of the witnesses cannot establish this. No inference can be drawn from her assisting her husband in the previous scuffle, in which it is proved that the son at first had the better of his father; and the only circumstance to connect her with the crime, is the remark which Mrs. Easson *thought* she made as to not being *fashed* with him again. Before she can be convicted, the jury must be satisfied, not only that she was in the house, but that she was actually and manually instrumental in the murder.

LORD MONCREIFF charged the jury, commenting on the evidence at some length, and pointing out the false statements contained in the declarations of both pannels. His Lordship expressed an opinion, that the death having been caused by strangulation, the case was clearly one of deliberate murder, and that the proof was very strong against the male pannel. In regard to the woman, her statement as to hearing the deceased fall over the stair, coincides in a remarkable manner with the evidence of Mrs. Easson, and the position in which the body was found. She is entitled to every benefit which she can derive from the evidence of the watchman, who, when he first heard the sound of the fatal quarrel, thought that it was drunk people fighting, and others *trying to pacify them*. It is also quite true, that if a wife merely conceals the commission of the crime, that which would scarcely be taken as a defence from a stranger accused of accession to the deed, will, from the relation in which she stands, be sufficient to acquit her. Before she can be convicted, the jury must be convinced that she was actually accessory to the murderous deed. But in determining this question, we must look to all the evidence taken together, including the fact of concealment. In the first quarrel, she was not merely passive, but active. Then it is not likely that a young man, such as the deceased, could be overpowered and murdered by strangulation, without her

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assistance. She was in the house—she was sober—her voice had been heard in the quarrel—the door of the house was locked when the police came. The livid marks on the two arms can scarcely have been caused by the violence of one person. Then the wife is seen first looking out to see if any one is in the court, and afterwards assisting to lay the body in a position which might correspond with the account she afterwards gave of it; and, finally, there is the expression used by her to her husband, as they retreat into their den,—"We shall not be *fashed* with him any longer." I much fear it is a strong case against her also.

The jury, by a large majority, found the pannel, Arthur Woods, guilty, and by a majority, found the libel against the pannel, Henrietta Young or Woods, not proven.

In respect of which verdict of Assize, the pannel, Henrietta Young or Woods, was assoilzied *simpliciter*, and dismissed from the bar; and the pannel, Arthur Woods, was sentenced to be executed at Dundee, on the 18th of March.[1]

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[1] In consequence of an application to the Secretary of State, the pannel, Arthur Woods, received a respite for one week; but no sufficient grounds having been shewn for a commutation of the sentence, it was carried into effect on the 25th of March. Some doubt is understood to have existed on the part of the Magistrates of Dundee as to the sufficiency of the original warrant, after the expiration of the period of the respite; but these doubts appear to have been unfounded, and accordingly no new warrant was applied for.

Present,

March 12
1839.

LORDS MACKENZIE, MONCREIFF, MEDWYN.

HER MAJESTY'S ADVOCATE—*Handyside—Davidson.*

AGAINST

PETER LEYS.—*Inglis.*

ASSAULT.—WITNESS.—1. A pannel convicted of aggravated assault, committed by pushing a fellow-traveller off a railway-carriage. Sentence, three months imprisonment in jail.

2. In a trial for assault, it is no objection to the admissibility of the injured party, that he has taken steps for prosecuting an action of damages against the pannel in the Civil Court.

No. 53.
Peter Leys.

Assault.

PETER LEYS was charged with Assault, especially when committed to the serious injury of the person and the danger of life:

IN SO FAR AS, on the 26th of July 1838, while the said Peter Leys was travelling in a railway carriage or waggon along the railway leading from Musselburgh to Edinburgh, and at or near that part of the said railway which is 80 yards or thereby to the eastward of a bridge over the turnpike road, and along which bridge the said railway passes, and which bridge, and the foresaid part of said railway, are situated at or near Wanton Walls, in the parish of Inveresk, and county of Edinburgh, the said Peter Leys did wickedly and feloniously attack and assault Alexander Rintoul, son of, and residing with, Henry Rintoul, in Brighton Street, in or near Edinburgh, who was then travelling on a railway carriage or waggon immediately behind and attached to the said carriage or waggon in which the said Peter Leys was travelling as aforesaid, and did seize hold of him, and did violently throw or push him off the said carriage on which he was then travelling; and the said Alexander Rintoul having fallen upon the said railway, the wheels, or one or more of them, of the said carriage on which he had been travelling, passed over him, whereby one of his thighs was fractured, and he received most serious injuries in the groin and other places in or near the lower part of his body, and in other parts of his person, to the danger of his life.

No. 53.
Peter Leys,
March 12
1839.

Assault.

The pannel pleaded not guilty, and a proof was led.

ALEXANDER RINTOUL, the party upon whom the assault was charged to have been committed, having been called as a witness,—

INGLIS, for the pannel, objected to his admissibility, on the ground of his having been admitted to the benefit of the poors' roll in the Court of Session, for the purpose of prosecuting an action of damages against the pannel for the same *species facti* as those detailed in the Indictment.

The objection was repelled.

The proof having been concluded, the Jury unanimously found the pannel guilty as libelled; but the serious consequences being quite unpremeditated, they unanimously and strongly recommended him to the leniency of the Court.

In respect of which verdict of Assize, he was sentenced to be imprisoned in the jail of Edinburgh, for the period of three calendar months.

March 13
1839.

Present,

LORDS MACKENZIE, MONCREIFF, COCKBURN.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Rutherfurd—Handyside.*

AGAINST

JAMES NIMMO AND JAMES FORSYTH.—*Taylor.*

PROCESS—CERTIFICATE OF CHARACTER.—1. Question, whether it is competent for the public prosecutor to contradict a certificate of character produced by the pannel, in mitigation of punishment, by the evidence of witnesses not contained in any list served on the pannel.
2. A certificate of previous good character having been produced by a

pannel in mitigation of punishment, which, from evidence before the Court, appeared to contain, if not a false statement, at least a suppression of the truth, the granter of the certificate ordered to attend at the Bar, but dismissed, after an explanation which was considered satisfactory.

No. 54. James Nimmo and James Forsyth, March 13 1839.

Assault.

JAMES NIMMO and JAMES FORSYTH were charged with Assault, aggravated in the case of Nimmo by having been committed to the effusion of blood, the serious injury of the person, and the imminent danger of life, and, in the case of Forsyth, by his having been previously convicted of assault.

They pleaded guilty as libelled.

TAYLOR, for the pannel Forsyth, addressed the Court in mitigation of punishment, and read a certificate of character to the following effect.

"HADDINGTON, 7th March 1839.

"This I certify, that James Forsyth, present prisoner in the jail here, "served me as an apprentice for three years, and all this period I con- "scientiously testify that he always evinced, in all his demeanour, the "most peaceable and obliging disposition to myself and customers. I "had the most perfect confidence in his honesty. I never had any "complaint all this time made to me against him. He seemed ever "desirous to do well.

"(Signed) A. B."

LORD COCKBURN observed, that from the date of the conviction for assault, produced against the pannel, (12th August 1837), it appeared that that conviction had taken place during the period of his apprenticeship.

TAYLOR, for the pannel, argued, that the certificate was entitled to some weight as evidence of his character, so far as it came within his master's knowledge. The conviction was merely for a petty brawl in the burgh court of Haddington, and as the sentence was alternative, being either the payment of a fine of ten shillings, or ten

No. 54. James Nimmo and James Forsyth, March 13 1839.

Assault.

days imprisonment, it may never have been known to the granter of the certificate.

THE SOLICITOR-GENERAL, for the prosecution, argued, that he was entitled, in the circumstances of the case, to examine witnesses in opposition to the certificate produced, even though the names of such witnesses were not contained in any list served upon the pannel.

LORD MONCREIFF.—I should be extremely unwilling, in the absence of the Lord Justice Clerk, to decide on the competency of the proposal now made on the part of the public prosecutor. The point has never been tried before, and is of great importance. But I see no occasion for deciding it here, as the certificate is not, in the circumstances of the case, entitled to any weight.

LORD COCKBURN.—I agree in thinking that we ought not to decide the question of competency just now; but I confess myself rather in favour of the right of the public prosecutor, to examine witnesses regarding the certificate, if it were necessary for the ends of justice.

LORD MACKENZIE expressed his concurrence.

THE SOLICITOR-GENERAL, for the prosecution, declined to press the point of competency, as the proceeding proposed seemed unnecessary in the present case.

In respect of their judicial confession, the pannels were sentenced to be imprisoned in the Bridewell of Edinburgh, Nimmo for twelve, and Forsyth for six calendar months.

After the above sentence was pronounced, the SOLICITOR-GENERAL called the attention of the Court to the terms of the certificate produced for the pannel Forsyth; and read a certificate under the hand of the town clerk of Haddington, from which it appeared, that besides the conviction for assault libelled on, which was dated 12th August 1837, the pannel had, on his own confession, been convicted of theft before the magistrates of Hadding-

No. 54. James Nimmo and James Forsyth, March 13 1839.

Assault.

ton, on the 13th of May, in the same year. In these circumstances, and as these convictions seemed to fall within the period embraced by the certificate produced by the pannel, he moved the Court to ordain the granter of the certificate to appear at the Bar, that he might have an opportunity of offering any explanation in the matter he might think proper.

The Court accordingly ordained the granter of the certificate to appear at the Bar on the 15th of March, in order to be judicially examined on the subject, and granted warrant for summoning such witnesses as either he or the Lord Advocate should deem necessary to be adduced in relation to the matter in question.

March 15 1839.

On the day appointed, the granter of the certificate appeared at the Bar, and stated that he was extremely sorry that he had unwittingly granted that document; that upon examining his books, he found that the pannel Forsyth had been only two years in his service, having entered it in the month of June 1837, which was subsequent to the conviction for theft; that that offence, as well as the conviction for assault in the following August, had entirely escaped his memory at the time of granting the certificate—and that he had not the slightest intention of stating what was not true, or of perverting the administration of justice.

THE SOLICITOR-GENERAL, with the concurrence of the Court, stated, that after the very candid explanation now given, and the contrition expressed, he did not consider it necessary to proceed farther against the party.

The Court accordingly dismissed him from the Bar, with an injunction to be more cautious and correct in future.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Rutherfurd—Handyside.*

AGAINST

JAMES STEVENS—*A. M'Neill.*

EVIDENCE.—WITNESS.—Held incompetent for the counsel for the pannel to contradict the evidence of a witness, by reading to the Jury a deposition made by him as a witness in a civil process, although the process, and consequently the deposition, were included in the productions libelled on.

No. 55. James Stevens, March 15 1839.

Fraudulent Bankruptcy.

JAMES STEVENS was charged with Fraudulent Bankruptcy, as also Fraud, more particularly the wickedly, fraudulently, and feloniously alienating and putting away, or carrying off, and secreting by an insolvent debtor, of any part of his funds and effects, with intent to defraud his creditors, and in contemplation of his absconding from his creditors, and leaving the kingdom with his debts unpaid.

He pleaded not guilty, and a proof was led.

HENRY SMITH, a witness for the prosecution, deponed that he had sold a cask of whiskey to the pannel, and had been in his shop thereafter, and shortly before his attempt to abscond. He was asked, in the course of his cross-examination for the pannel, whether he did not then see the cask there, and whether the pannel did not say that the cask was still in the shop, and that the witness might take it away if he chose. The witness answered, that he had been in the shop, but did not see the cask, and that the pannel had not said so, *according to his recollection.* He adhered to this statement when the question was repeated, always qualifying it by reference to his recollection, in which, however, he stated he was quite confident.

A. M'NEILL, for the pannel, referred to a deposition emitted by Smith, as a witness in a "process of Cessio

bonorum, James Stevens against his creditors," which was among the productions libelled on for the prosecution. He stated that the purport of that deposition was the reverse of what the witness had now sworn, and he proposed to read the deposition, or at least part of it, to the Jury.

No. 55. James Stevens, March 15 1839.

Fraudulent Bankruptcy.

THE SOLICITOR-GENERAL, for the prosecution, objected.

The Court sustained the objection, holding, (1.) that though the process was libelled on, it did not follow that everything therein contained could competently be read to the Jury; (2.) that whatever might have been the case, if it had been proposed to put the deposition into the hands of the witness, with a view to his reading it, in order to refresh his memory, and then to examine him in reference to the two statements, the present proposal to have it read to the Jury in order to contradict him, was not warranted by the practice of the Court, which, in ordinary circumstances, did not recognise the competency of producing such depositions,—emitted in a different cause,—without first warning the witness, and showing him the paper, and examining him on it; and, (3.) that the proceeding proposed was more particularly objectionable, when the deposition happens to be taken in an inferior court, in the absence of a party able and interested to cross-examine, and when it is probable that the circumstance subsequently discovered to be important was not thought material at the time, nor the deponent's attention called to it.

The Jury unanimously found the pannel guilty of fraud as libelled; but, in consideration of his former good character, recommended him to the leniency of the Court.

In respect of which verdict of Assize, he was sentenced to be imprisoned in the jail of Edinburgh, for the period of six calendar months.

NORTH CIRCUIT.

Spring 1839.

INVERNESS.

April 13
1839.

Judge.—LORD COCKBURN.

HER MAJESTY'S ADVOCATE—*Craufurd.*

AGAINST

GEORGE M'KAY *alias* BAIN and Others.—*E. S. Gordon.*

WITNESS.—An objection to the erroneous designation of a witness, taken before the jury were sworn, repelled, in respect it was not alleged for the pannels that they had made any inquiries regarding him.

No. 56. George M'Kay and others.

Theft.

GEORGE M'KAY *alias* BAIN, fisherman, residing at Armadale, in the parish of Farr, and county of Sutherland, and eleven other pannels, were charged with Theft, committed by stealing various articles from the wreck of a brig which had been stranded in the bay of Armadale.

They pleaded not guilty.

The master of the stranded brig was stated, in the Indictment, to have been "John Nixon, now or lately residing in Moore Street, Coronation Street, Sunderland," in whose lawful possession most of the articles were libelled to have been. He was similarly designed in the list of witnesses.

Before the jury were sworn, E. S. GORDON, for the pannels, objected to the designation of this witness, John Nixon, that he did not reside in Sunderland, and had not done so for the last two years.

The Court repelled the objection, in respect it was not alleged that the pannels had made inquiry for the witness, and been unable to find him.

A proof having been led, the Jury found the pannel, George M'Kay *alias* Bain, and five others, guilty; but, from their great anxiety to save the lives of the crew, recommended them to the leniency of the Court; and found the other six not guilty.

No. 56. George M'Kay and others. Inverness, April 13 1839.

Theft.

In respect of which verdict of Assize, the pannels who had been found guilty, were sentenced to be imprisoned in the jail of Dornoch, for the period of three calendar months.

HER MAJESTY'S ADVOCATE—*Craufurd.*

AGAINST

RODERICK MACKENZIE.—*E. S. Gordon.*

DECLARATION.—The declaration of a pannel who had deponed in Gaelic, found not to be sufficiently proved by the evidence of two witnesses, one of whom did not understand that language.

RODERICK MACKENZIE was charged with Theft, particularly Horse Stealing.

He pleaded not guilty, and a proof was led.

No. 57. Roderick Mackenzie, Inverness, April 13 1839.

Horse Stealing.

Two witnesses were adduced to prove the declarations of the pannel, of whom one did not understand Gaelic, in which language the pannel's answers were given, and the other had acted as interpreter.

E. S. GORDON, for the pannel, objected, that the declarations could not, on such proof, be admitted as evidence.

The Court sustained the objection.

No. 57. Roderick Mackenzie, Inverness, April 13 1839.

The proof having been concluded, the Jury found the libel not proven.

In respect of which verdict of Assize, the pannel was assoilzied *simpliciter*, and dismissed from the bar.

Horse Stealing.

ABERDEEN.

April 18 1839.

Judges—LORDS MONCREIFF AND COCKBURN.

HER MAJESTY'S ADVOCATE—*Innes*.

AGAINST

JAMES SMITH.—*Fordyce*.

FALSEHOOD, FRAUD, and WILFUL IMPOSITION.—1. A pannel who, having ordered goods from various tradesmen, on the assurance of payment on delivery, afterwards obtained possession of them by falsely representing himself as obliged suddenly to leave town in the course of his employment as a workman, and promising, if the goods were delivered at his house, to pay for them on the following lawful day, which promise he never performed, and thus imposed upon the tradesmen, and cheated them out of their property, found to be relevantly charged with Falsehood, Fraud, and Wilful Imposition.

2. Observed, that the assumption of a false character is not necessary to the constitution of this crime.

No. 58. James Smith.

JAMES SMITH was charged with Falsehood, Fraud, and wilful Imposition, as also Swindling, as also Theft:

Falsehood, Fraud, &c.

IN SO FAR AS, in the course of the months of November and December 1837, and January 1838, the said James Smith did call at the shops of various tradesmen in Aberdeen, and did order from each of them articles of wearing apparel for himself; and having induced them severally to execute his orders, on the assurance to each that he would, on a particular day named by him, call personally and receive delivery of the article ordered, and on the agreement or understanding, he being a stranger to them all, that he would on delivery pay the price of the article ordered in cash, he the said James Smith did, on the particular day so named, write, and cause to be delivered to each of those tradesmen, false and fraudulent letters, representing and pretending that he was unable to call and take delivery of the articles as agreed on,

No. 58. James Smith, Aberdeen, April 18 1839.

Falsehood, Fraud, &c.

by having been suddenly called out of Aberdeen to some place in the neighbourhood, or in the county of Aberdeen, which he specified, and this, in the course of his employment as a workman, or in some other capacity; and on this false and fraudulent statement, requesting that the particular article ordered by him should be sent to his house, and promising to pay for it on the next following lawful day; and by these false and fraudulent representations, he induced various tradesmen to deliver the articles so ordered by him, as he directed, and to give him credit for the price thereof; and did wilfully impose himself upon them in the false character of a person then engaged in some lawful employment at the places specified by him, although he was not so engaged, nor deriving the means of subsistence from any lawful employment whatever; and he did fail to pay the price of the said articles delivered to, and received by him; and by the said false and fraudulent representations, and the assumption of the foresaid false character, he wilfully imposed upon various tradesmen, and did cozen, and defraud, and cheat, and swindle them out of their property.

This narrative was followed by eight specific charges of Swindling, and one of Theft.

FORDYCE, for the pannel, objected to the relevancy of the Indictment. The detail given in the minor proposition, of the pannel's transactions with the different tradesmen, amounted to no more than an ordinary dealing with a stranger, with whom they were willing to transact, not on the faith of personal credit arising from *status* or otherwise, but on the sole condition of payment on delivery. The idea of an assumption of a false character is thus excluded, and if any of the tradesmen afterwards delivered the articles ordered, without receiving payment, he, by doing so, gave his consent to a new form of transaction, namely, one of debit and credit, for which he may have the usual civil remedy, but which necessarily excludes the crime libelled.

The Court repelled the objection, observing, that the assumption of a false character was not necessary to constitute the crime of swindling, which was clearly committed by a party who having ordered goods without the intention of paying for them, contrives to get them into his possession by such a device as that set forth in the Indictment.

No. 58. James Smith, Aberdeen, April 18 1839.

Falsehood, Fraud, &c.

The pannel pleaded guilty.

In respect of which judicial confession, he was sentenced to be transported beyond seas for the period of seven years.

April 20 1839.

HER MAJESTY'S ADVOCATE—*Innes.*

AGAINST

ALEXANDER STEPHENS—*E. S. Gordon.*

PROCURATOR-FISCAL—PRECOGNITION—WITNESS.—1. The evidence of the Procurator-Fiscal held admissible, for the purpose of proving what a deceased witness said on precognition; but he having stated that he had recently read the precognition, and that he could not accurately distinguish between his recollection of what the witness said, and of what was contained in her written deposition, his evidence rejected.

2. The evidence of the clerk by whom the precognition of a deceased witness was taken down, admitted, to prove what the witness said on that occasion.

3. Circumstances in which proof was allowed on the part of the pannel, that a witness had, when not on oath, made a statement different from that to which he swore in the witness box.

4. A witness is not bound to answer a question inferring against him the crime of adultery.

No. 59. Alexander Stephens, Aberdeen.

Rape.

ALEXANDER STEPHENS was charged alternatively with Rape, or Assault with intent to Ravish. The person on whom the crimes were alleged to have been committed, was a married woman, who was since dead.

The pannel pleaded not guilty, and special defences were lodged for him, adhering to the statement in his declaration, wherein he admitted the fact of connection, but stated that it was voluntary, and offering to prove circumstances tending to establish, that the woman was not a person of chaste character and correct behaviour.

1. In the course of the proof, the Procurator Fiscal was tendered as a witness for the prosecution, for the purpose

No. 59. Alexander Stephens, Aberdeen, April 20 1839.

Rape.

of proving statements regarding the crime charged, made to him by the woman alleged to have been assaulted.

E. S. GORDON, for the pannel, objected to his admissibility. (1.) The agent for the prosecution is undoubtedly admitted, to prove certain points in a case, such as declarations; but he is not a competent witness in regard to statements made to him while collecting evidence in support of the charge, as to which it is not likely that he can be free from bias. (2.) The object is to prove what the deceased said on precognition as a witness. Now, the pannel is prepared to prove, that her examination on that occasion was reduced to writing, and signed by herself. If, therefore, this written precognition would have been competent evidence, it ought to have been libelled on, and produced. And if, (as is maintained,) it would have been inadmissible, the objection applies *a fortiori* to the evidence of the proposed witness, who can speak only to its contents. (Opinion of Lord Gillies in the case of Watson *v.* Glass; 7 March 1837. 15 Dunlop and Bell 757.)

The Court found, that, in the circumstances of this case, the witness tendered was not inadmissible, reserving all objections to his credit, or to any particular question that might be put to him.

The Procurator-Fiscal was accordingly sworn, and examined *in initialibus*. He deponed that he had had several conversations with the deceased, relative to the case, before taking the formal precognition; that he had lately read over the precognition with a view to his being called as a witness on this trial; and that he could not accurately distinguish between the answers which the woman gave in conversation, and her statements as contained in the written precognition.

On this statement, the Court refused to receive his evidence, in respect that in his recollection, what was said by the woman was confused with what was written in the precognition.

2. The clerk by whom the deceased witness' precogni-

No. 59. Alexander Stephens, Aberdeen, April 20 1839.

Rape.

tion was taken was next called. He stated, on examination *in initialibus*, that he had written the precognition under the Procurator-Fiscal's dictation, as delivered by the woman, and had soon afterwards made a copy of it by his directions, but that he has not seen it since the woman's death.

E. S. GORDON, for the pannel, repeated the objection to the admissibility of this witness. But the Court repelled the objection, and held him admissible.

3. The husband of the woman alleged to have been assaulted, deponed, that he had seen from some distance a part of the assault, but that he had not seen the pannel throw his wife down. The deceased had stated in her precognition, that she did not think she could have been seen by her husband, at the place where the assault was committed.

E. S. GORDON, for the pannel, proposed to ask a subsequent witness, whether the husband had not said in the presence, and within the hearing of the deceased, that he saw the pannel throw her down.

INNES, for the prosecution, objected, that it was incompetent to contradict a witness' statement on oath by proof of what he may have said when not on oath.

E. S. GORDON, for the pannel, answered.—It is competent in ordinary cases of rape to contradict the evidence of the woman, by proving what she may have said extrajudicially. And anything said in her presence, and within her hearing, when not contradicted by her, is as admissible to affect her evidence as a statement by herself. Farther, in this case, the woman is dead. It is competent, therefore, to prove her statements by those who heard them; and any statement made in her presence, and not contradicted by her, became, to a certain extent, her statement.

The Court sustained the competency of the question proposed to be put to the witness.

4. A medical gentleman, who had signed one of the certificates libelled on, deponed, that he had occasionally attended

the deceased and her husband, and that he had thus opportunities of seeing and judging of her conduct, which was that of a modest woman.

No. 59. Alexander Stephens, Aberdeen, April 20 1839.

Rape.

On cross-examination for the pannel, he was asked whether he had himself ever had carnal connection with the deceased.

The Court intimated to the witness, that, as the question was one inferring the guilt of adultery, and tending to criminate himself, he was not bound to answer it unless he pleased.

The witness, after some hesitation, declined to answer the question.

The proof having been concluded, Lord Cockburn charged the Jury. His Lordship indicated an opinion that the verdict ought to be one of not guilty.

The Jury unanimously found the libel not proven.

In respect of which verdict of Assize, the pannel was assoilzied *simpliciter*, and dismissed from the bar.

SOUTH CIRCUIT.

Spring 1839.

JEDBURGH.

Judge—LORD MACKENZIE.

April 17 1839.

HER MAJESTY'S ADVOCATE—*Handyside.*

AGAINST

ALXEXANDER WHITELAW—*Swinton.*

FORGERY.—A pannel having pleaded guilty to a charge of forging the name of another, as co-acceptor along with himself to a bill of exchange, prepared by the clerk of a road trust, in order to constitute a cautionery obligation for payment of the rent offered by the pannel for a toll-bar; held, that the crime was one which, previous to the

No. 60. Alexander Whitelaw, Jedburgh, April 17 1839.

passing of the act 2d and 3d William IV. c. 123, would have been capital, and the punishment of which was therefore now regulated by the act 1st Victoria, c. 84.

Forgery.

ALEXANDER WHITELAW was charged with Forgery, as also the wickedly and feloniously Using and Uttering as genuine any Forged Bill of Exchange, or other obligatory writing, knowing the same to be forged.

IN SO FAR AS, the said Alexander Whitelaw having become tenant of Skinlaws toll-bar, situated in the parish of Nenthorn and county of Berwick, under the trustees and commissioners appointed by act of Parliament, upon the road called the Whiteburn and Kelso road, in the county of Berwick, and that for the year from the 26th day of May 1836, to the 26th day of May 1837, and it being one of the articles and conditions of letting to him the said toll-bar, that he should find caution for payment of the rent offered by him to the satisfaction of the said trustees, and he, on being preferred as tenant of the said toll-bar, having named and offered Ralph Story, then and now or lately herd, Blanerne, West-side, parish of Buncle, and county of Berwick, and William Trotter, steward, Todrigg, and John Mann at Polwarthmill, to be his cautioners, and the same having been accepted by John Romanes, clerk to, and as authorised by, and acting for the said trustees and commissioners, and the said John Romanes having drawn out, or caused to be drawn out, in order to constitute a cautionary obligation, a bill of exchange, conceived in the following or similar terms:

L.44. " Lauder, 21st April 1836.

" Conjunctly and severally against the twenty-sixth day of May,
" in the year eighteen hundred and thirty-seven, in the Bank of
" Scotland's Office here, pay to me, or my order, forty-four pounds
" stg. being a quarter's rent of Skinlaws toll-bar.

" To Messrs. Alexr. Whitelaw, Stockbridge toll,
" Ralph Story, Herd, Blanerne, Westside,
" Wm. Trotter, Steward to Mr. Johnstone,
" Todrigg, and John Mann, Polwarthmill toll;"

and having delivered or transmitted the same to the said Alexander Whitelaw, on or about the date thereof, in order that he might subscribe the same himself as acceptor, and obtain the subscriptions thereto of the other persons to whom the same was addressed, as co-acceptors with him, and he having received the said bill, and subscribed his own name thereto as acceptor, and having procured the subscriptions likewise of the said William Trotter, he the said Alexander Whitelaw did, on the

No. 60. Alexander Whitelaw, Jedburgh, April 17 1839.

Forgery.

21st of April 1836, within the toll house at Skinlaws aforesaid, or within the toll house of Stockbridge, situated in the parish of Westruther, and county of Berwick, or at some other time and place to the Prosecutor unknown, wickedly and feloniously forge and adhibit, or cause and procure to be forged and adhibited to the said bill, the subscription "Ralph Story," as an acceptor thereof, intending the same to pass for, and to be received as the genuine subscription of the said Ralph Story, then herd, Blanerne, Westside, and now or lately shepherd at Mungoswalls, parish of Edrom, and county of Berwick: FARTHER, time last libelled, and within the office or house situated in Lauder aforesaid, of the said John Romanes, the said Alexander Whitelaw did, wickedly and feloniously use and utter as genuine, the said bill of exchange, having thereon the said forged subscription, he well knowing the same to be forged, by then and there delivering the same himself, or causing and procuring, through the intervention of some person to the prosecutor unknown, the same to be delivered to the said John Romanes, as clerk to the said trustees, in order to the same being retained and made use of by him, or the said trustees, as a security or cautionary obligation, for the due payment of a quarter's rent to become due by the said Alexander Whitelaw, as tenant of Skinlaws toll-bar aforesaid; and the said bill, having the said forged subscription thereon, having been taken and received by the said John Romanes, was subscribed as drawn by John Spottiswoode, Esq. of Spottiswoode, in the county of Berwick, one of the trustees and commissioners of said road.

There was also a second charge, of a precisely similar nature.

The pannel pleaded guilty.

SWINTON, for the pannel, argued, that the crime charged in the Indictment would not have been capital previous to the passing of the act 2d and 3d William IV. c. 123, and, therefore, that the Court, in awarding sentence, was not limited to the punishments prescribed by the act 1st Victoria, c. 84, (Case of John Jerdon, Jedburgh, May 3 1837, Swinton, Vol. I. p. 502.)

LORD MACKENZIE delayed pronouncing sentence till the following day, when he stated his opinion that the case was one which must have been capital before the passing of the act 2d and 3d William IV. c. 123.

No. 60. Alexander Whitelaw, Jedburgh, April 18 1839.

In respect of his judicial confession, the pannel was sentenced to be transported beyond seas, for the period of seven years.

Forgery.

WEST CIRCUIT.

Spring 1839.

GLASGOW.

May 4 1839.

Judges—LORDS MEADOWBANK AND MEDWYN.

HER MAJESTY'S ADVOCATE—*Napier—Davidson.*

AGAINST

DANIEL MACKENZIE, WILLIAM JOHNSTON, AND MARY FERGUSON.—*Broun—C. G. Robertson.*

INDICTMENT—WITNESS.—Held competent to strike certain letters out of an Indictment, for the purpose of correcting an error in the designations of some of the witnesses.

No. 61. Daniel Mackenzie and others.

Theft, &c.

DANIEL MACKENZIE, WILLIAM JOHNSTON, and MARY FERGUSON, were charged with Theft, aggravated by having been committed by means of Housebreaking, and farther aggravated, in the case of Mackenzie, by his having been previously convicted of Theft.

The premises alleged to have been broken into were the shop or warehouse in or near Buchanan Street, &c. "occupied by the firm or company of James H. Paterson and Company." In the list of witnesses, Mr. Paterson, the only partner of the firm, was designed "James *Hugh* Paterson," whereas his name was understood to be James *Henry* Paterson. And two other witnesses were designed as "in the service of James Hugh Paterson and Company."

NAPIER, for the prosecution, moved, that before calling upon the pannels to plead to the Indictment, the word "Hugh," as occurring in the name of "James Hugh Pa-

terson," both in the designation of that gentleman and of the two witnesses in his service, should be struck out of the Indictment. (Hume, Vol. II. p. 280, note (a). Statute 9th Geo. IV. c. 29, § 11. Case of James Matheson, Nov. 20th 1837. Swinton, Vol. I. p. 593.)

BROUN, for the pannels, objected, that it was not competent to alter an Indictment after service, and that, if the present motion were allowed, other witnesses than those described might be brought forward.

The Court granted the proposal made on the part of the prosecution, which, by their Lordships suggestion, was altered so as to strike out only the letters u, g, h of the word "Hugh" in the several places referred to, leaving the name "James H. Paterson," as in the body of the Indictment. Their Lordships, at the same time, observed, that the correction now made did not affect the right of the pannels to show, under the statute, before the Jury were sworn, that they had been misled as to these or other witnesses.

The pannels pleaded not guilty, and a proof was led.

The Jury found the pannels, Mackenzie and Johnston guilty as libelled, and the pannel Ferguson guilty without the aggravation of housebreaking.

In respect of which verdict of Assize, the pannels, Mackenzie and Johnston, were sentenced to be transported beyond seas, for the period of seven years, and the pannel Ferguson to be imprisoned in the Bridewell of Glasgow, for the period of twelve calendar months.

HIGH COURT.

April 29
1839.

Present,

LORDS MEADOWBANK, MACKENZIE, MONCREIFF, COCKBURN.

HER MAJESTY'S ADVOCATE—*Lord Advocate Rutherfurd*—Sol.-Gen. Ivory*—Innes—Handyside.*

AGAINST

ALEXANDER HUMPHREYS OR ALEXANDER—*Robertson—Anderson Inglis.*

FORGERY.—EVIDENCE.—PROCESS.—PRODUCTION.—FOREIGN—WITNESS.—SENTENCE.—1. (1.) In a trial for Forgery, a chemical experiment permitted to be made on a part of one of the documents alleged to be forged, with a view of ascertaining whether the colour of the paper was the effect of age, or was produced by artificial means—this experiment not being such as could injure the body of the document. (2.) Question, whether such an experiment should be conducted jointly by two scientific witnesses, or by each separately.

2. Form of adjournment at the close of each day of a protracted trial.

3. Circumstances in which the Prosecutor was allowed to libel on as a production, and to read to the Jury a judgment by a Lord Ordinary in the Court of Session, in a case in which the pannel was a party, although that judgment commented on certain documents on which the pannel intended to found.

4. An objection, founded on the insufficient description of one of the productions libelled on, repelled.

5. Question as to the competency of producing an extract from a foreign register, without evidence as to the accuracy of the record from which it is taken, and as to the faith which it would have in a foreign court.

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* John Archibald Murray, Esq. the late Lord Advocate, having been appointed one of the Lords of Council and Session, in room of Lord Corehouse resigned, the late Solicitor-General, (*Rutherfurd*), appeared in Court on the 23d of April, and presented a commission nominating and appointing him to the vacant office; which having been recorded, he qualified himself by taking the necessary oaths, and was thereupon received in Court as her Majesty's Advocate. James Ivory, Esq. Advocate, was, at the same time, appointed to the office of Solicitor-General.

6. *It* is no objection to the admissibility of a foreign witness that, in order to induce him to come to this country to give evidence, he has received, besides his expenses, a sum considerably greater than what he could have derived at home from the profits of his trade.
7. The hand writing of a party, deceased more than a hundred years ago, allowed to be proved, for the purpose of allowing an attestation, to which his signature was attached, to be read to the Jury; but held, that this attestation could not be read, to the effect of proving the truth of any fact therein set forth.
8. Held incompetent to produce in evidence letters written by a party who was proved to be alive, although the hand writing was proved by a witness, and the post-marks were admitted.
9. Circumstances in which a sentence of *absolvitor* was pronounced in absence of the pannel.

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ALEXANDER HUMPHREYS or ALEXANDER, pretending to be Earl of Stirling, was charged[1] with "Forgery, *as also* "the wickedly and feloniously using and uttering as ge- "nuine any forged document, knowing the same to be for- "ged; *as also* the wickedly and feloniously fabricating "false and simulate writings to be used as evidence in "Courts of law, and so using the same as genuine; *as* "*also* the wickedly and feloniously using and uttering as "genuine, fabricated, false, and simulate writings, know- "ing them to be fabricated, false, and simulate, by pro- "ducing the same as evidence in Courts of law."

The Indictment narrated, that the pannel had formed

[1] The pannel was first brought before the Court under this Indictment on the 3d of April. The defences which had been lodged for him stated, that his services as nearest and lawful heir to William, first Earl of Stirling, having been reduced by Interlocutor of Lord Cockburn, although that Interlocutor was not yet final, he was advised that he was not in a condition to plead the privilege of peerage, but was bound to acknowledge the competency of the Court to proceed in the trial of the felonies libelled, but prayed the Court to delay the trial, in order to afford him time to adduce exculpatory witnesses. The Court accordingly, after pronouncing the Interlocutor of relevancy, continued the diet against the pannel till the 29th of April. The very interesting nature of the trial which then took place, has led to its publication in a separate volume, containing the whole evidence, oral and documentary, and the speeches of Counsel, and the charge of the presiding Judge, carefully revised, and illustrated by fac-similes of the forged documents.

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the fraudulent design of procuring himself to be recognised as Earl of Stirling in Scotland, and of obtaining certain great estates or territories in North America and Scotland, with the pretended right of conferring the honours, and bestowing the titles of baronets of Nova Scotia, as being the representative, and entitled to the honours, privileges, and estates of William, first Earl of Stirling, and of procuring loans or advances of money from ignorant and credulous persons, on the faith of his being entitled to those estates and privileges, as he falsely represented. The *first* and *second* charges bore, that in pursuance of the said fraudulent designs, he did, at some time and place to the Prosecutor unknown, forge, or procure to be forged, a document, (the terms of which were set forth in an Appendix to the Indictment, both in the original Latin, and in an English translation,) which document was intended by him to pass for an ancient and authentic excerpt, or abridged copy, or abstract, of an alleged charter of *novodamus* by King Charles the First, in favour of William, first Earl of Stirling; and that on the 18th of January, and 17th of November, 1830, he used and uttered as genuine the said forged document, by producing it as an adminicle of evidence in two different actions raised by him in the Court of Session, for proving the tenor of the said alleged charter of *novodamus*. The *third* charge set forth, that having procured himself to be served heir, both in general and in special, of William the first Earl of Stirling, and to be infeft as such in certain lands, continents, and islands in North America, and an action of reduction improbation having been raised against him at the instance of the Officers of State for Scotland, and Lord Cockburn, Ordinary, having in this action pronounced an interlocutor, accompanied by a note pointing out certain defects in the evidence for proving his alleged pedigree, he did, with the view of supplying these defects, within the house situated in the Rue de Tournon, at Paris, occupied by Marie Anne le Normand, bookseller, or fortune-teller, at some time between the 21st December 1836, and the 27th July 1837, forge, or pro-

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cure to be forged, certain documents, some of which were written, and others pasted on the back of an ancient map of Canada, and did on the 25th November 1837, use and utter as genuine the said forged documents, by producing them in process as evidence in his behalf, in the said action of reduction improbation,—with an alternative charge of guilty uttering only. The writings referred to, (all of which were set forth at length in the Indictment, both in the original French and in an English translation,) were, (1.) A note relative to the alleged charter of *novodamus* by King Charles the First, in favour of William, first Earl of Stirling, dated "Lyons, 4th August 1706," and signed "Ph. Mallet;" (2 and 3,) two other writings on the same subject, the one dated "Lyons, 6th April 1707," and signed "Caron Saint Estienne," and the other dated "Nismes, 3 June 1707," and bearing what was meant to pass for the genuine subscription of Esprit Flechier, sometime Bishop of Nismes; (4 and 5,) a letter dated "Antrim, 25th August 1707," and signed "John Alexander," the said signature being meant to pass for the genuine subscription of the grandson of William, first Earl of Stirling, and a marginal note on the said letter, bearing what was meant to pass for the genuine subscription of François Fenelon, sometime Archbishop of Cambray; (6 and 7,) an inscription to the memory of John Alexander, Esquire, alleged to be taken from a tomb-stone at Newton Ardes, county of Down, Ireland, with two marginal notes relative to the same; and (8,) a note or writing referring to the document bearing to be signed "Ph. Mallet," and meant to pass for a genuine note or writing of Lewis XV., King of France, or some person to the Prosecutor unknown. The *fourth* charge was to the effect, that the pannel, within the house of Marie Anne Le Normand, at Paris, between the 21st December 1836, and the 21st April 1837, forged or procured to be forged, two letters addressed to Messrs. De Porquet & Co., booksellers, London,—a note or writing on a parchment case, with three fabricated impressions of a seal, the same being meant to

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pass for a genuine writing, and a genuine and contemporary impression of a seal of the pannel's deceased father—a writing or table bearing to be part of the genealogical tree of the Alexanders of Menstry, Earls of Stirling in Scotland, and to be dated April 15, 1759,—a letter dated London, August 20, 1765, bearing what was meant to pass for the genuine subscription of the deceased Benjamin Alexander, said to be the pannel's uncle,—and another letter dated "Dublin, September 16, 1765," and signed "A. E. Baillie;" and that on the 27th of November 1837, he used and uttered as genuine these six forged writings, by lodging them in process as evidence in his behalf in the action of reduction improbation—with an alternative charge of guilty uttering only. The *fifth* charge set forth, that the Second Division of the Court of Session having appointed the pannel to appear at the bar, to be judicially examined as to how certain of these documents came into his possession, or to his knowledge, and he, in the course of that examination, on or about the 18th of December 1838, having stated that he had received the map of Canada, with the various documents written or pasted thereon, from the said Marie Anne le Normand, and that she received a letter along with the documents, a copy of which he undertook to procure, he did, at some time and place to the Prosecutor unknown, forge or procure to be forged, a writing bearing to be "Copy letter found by Mademoiselle le Normand, enclosed in the same packet which contained the map of Canada, and was left at her Cabinet on July 11, 1837,"—and did, on the 20th December 1838, use and utter as genuine the said forged writing, by lodging it in process as evidence in his behalf in the action of reduction improbation.[1]

[1] Two separate lists of Assize were appended to the Indictment, to meet the contingency of the pannel claiming, or being found entitled to the privilege of a landed man. But at the diet of the 3d of April, it was stated by his counsel that he did not intend to claim this privilege. And accordingly the Interlocutor of relevancy pronounced on that occasion, remitted the libel to the knowledge of the ordinary Assize.

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The pannel pleaded not guilty. Defences had been lodged for him, in which he denied " that he had the slightest ground to suspect that all or any of the documents libelled on were forged or fabricated," and stated that " he produced them under legal advice, in the belief of their being genuine, and useful for the support of his interest."

1. In the course of the proof, the LORD ADVOCATE, for the prosecution, proposed that two scientific gentlemen, whose names were included in the list of witnesses, should be allowed to make chemical experiments upon some of the documents charged to have been forged, particularly upon the alleged excerpt from a charter of *novodamus* by King Charles the First, in order that they might be able to give an opinion, as to whether or not the paper on which it was written had been tampered with, and whether there was anything particular in the ink with which it was written.

ROBERTSON, for the pannel, objected to the proposed proceeding, on the ground that a chemical experiment might change the whole appearance of the document, on which, from the evidence already adduced, the whole case seemed to depend.

LORD MONCREIFF.—The strictest case which can be maintained against the Crown is, that the witnesses can make the proposed experiment only in Court

LORD COCKBURN.—Suppose that one of these scientific witnesses should state in the course of his examination, in regard to the documents in question, that he wished to test the ink and the appearance of the paper by a chemical operation, which he could not perform except at his own house, would not the Court allow him to do so?

DR. ANDREW FYFE, *Lecturer on Chemistry*, was examined, and stated that the alleged excerpt charter had been placed in his hands sometime before by the Crown agent, and that he had tested the paper on which it was written with bleaching powder,—that the result of his experiment, so far as it went, was a conviction that the colour of the paper was owing to some organic matter,

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either vegetable or animal, and that the paper itself contained some acid,—that it would be satisfactory to himself, and would enable him to give a sounder opinion, were he allowed to extend his experiments to a larger portion of the paper,—and that this could be done by operating merely on the blank leaf at the end of the document, and without at all touching the writing.

The LORD ADVOCATE, for the prosecution, then renewed his application for a chemical experiment.

ROBERTSON, for the pannel, had no objections to the course proposed to be taken, provided that the witness's operations were strictly confined to the blank leaf of paper, and that this examination, by chemical gentlemen, was made apart from one another.

The LORD ADVOCATE.—In the case of professional witnesses, their reports are usually conjoint.

ANDERSON.—But such reports are not prepared after they have been enclosed.

LORD MONCREIFF.—It is better in this case that the examination should be separate.

HENRY R. MADDEN, *surgeon*, was called in, and the oath administered to him. The blank leaf was detached from the document by the Clerk of Court, and one half of it given to him, and the other to Dr. Fyfe. It was explained to these gentlemen, that they were separately, and in their own houses, to subject the paper to any chemical process which they thought fit, specially in order to discover whether it contained any liquid or colouring matter.

LORD MEADOWBANK.—It is to be understood, that we lay down no rule, as to the competency or incompetency of a joint examination by scientific gentlemen, in a matter of this nature.

2. At half-past six o'clock, the Court adjourned, after pronouncing the following Interlocutor:—

"In respect of the length of time already occupied by this trial, and

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the impossibility of bringing it to a conclusion in the course of the present sederunt, the Lords Commissioners of Justiciary, with the consent of both parties, and in respect of the necessity of the case, continue the diet against the pannel till to-morrow morning at nine o'clock; and ordain the haill parties, pannel, witnesses, assizers, and all concerned, then to attend, each under the pains of law; the pannel being in the mean time carried to, and detained in, the Tolbooth of Edinburgh; and the haill fifteen jurors now in the box, being hereby ordained to repair, under the charge of John Amory, and William John Munro, two of the macers of Court, to M'Queen's Hotel, Prince's Street, Edinburgh, where it is stated that proper accommodation has been provided for them, to remain under the charge of said macers till brought here to-morrow morning in the hour of cause above mentioned, and being strictly secluded, during the period of adjournment, from all communication with any person whatever, on the subject of this trial—the said macers always having necessary access to them, for the purpose of seeing to their proper accommodation, and the Clerk of Court having access to, and liberty to communicate with them, in relation to their private or personal affairs, if this shall become necessary. And the said John Amory and William John Munro, macers, and Charles Neaves, depute-clerk of Court, had administered to them respectively the oath *de fideli*, to have no communication themselves, and to permit no communication by others, with the Jury on the subject of this trial, and to be otherwise faithful in the premises."[1]

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3. INNES, for the prosecution, proposed to read to the Jury the judgment of the Lord Ordinary in the action of reduction improbation, raised by the Officers of State for the purpose of reducing the pannel's services as heir, in general and in special, of William, first Earl of Stirling. The process in which this judgment was pronounced was among the productions libelled on.

ROBERTSON, for the pannel, objected, on the ground that the note by the Lord Ordinary contained comments on the evidence in the case, and particularly

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[1] The Court adjourned on the three following evenings under similar provisions. And at the close of the trial, the presiding Judge intimated to the Jury that, in consequence of the laborious duty which they had undergone, they would be excused from serving as jurymen for two years. A similar exemption was granted to the Jury who acted on the trial of the Glasgow Cotton-spinners; *ante* p. 15.

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on certain affidavits on which the pannel intended to found.

LORD MONCREIFF.—The Lord Ordinary's note is set forth in the Indictment as the moving cause of the forged documents having been uttered.

LORD MACKENZIE.—The counsel for the pannel may argue to the Jury that the Lord Ordinary was mistaken in this opinion, but they cannot prevent the note being read.

The objection was accordingly repelled.

4. Among the productions libelled on was "a volume of maps without title." Mr. TEULET, *Joint-Secretary of the Archives of France*, being under examination,—

INNES, for the prosecution, proposed to put this volume into the witness' hands, for the purpose, (as afterwards appeared,) of eliciting some information regarding certain points of resemblance between some of the maps contained in it, and the map on the back of which the writings referred to in the fifth charge of the Indictment were written or pasted.[1]

ROBERTSON, for the pannel, objected to the production

It will be observed that some of the documents written on the back of the map libelled on, were dated in 1706 and 1707; and that others of them bore to be autographs of Fenelon and Flechier, the former of whom died in 1715, and the latter in 1711. In order to establish that these documents were forgeries, evidence was brought, on the part of the prosecution, to prove, that though the map bore to be dated in 1703, this particular impression could not have been thrown off till after 1718, that being the date at which the author, *Guillaume Delisle*, was appointed "*Premier Géographe du Roi*," which addition was appended to his name on the title of the map. And the object of referring to the volume noticed in the text, was to show, by the production of several maps of Delisle's,—avowedly not printed till 1745,—that the titles, even of these late impressions, while they contained any alterations that had taken place in the designation or residence of the author, preserved the original date. The reason of this proceeding was explained by the witness to be, that the date at which the map was originally published, was that from which the copy-right commenced to run.

of the volume, in respect, (1.) that no information was given as to where it came from, and no intimation made to the pannel of the prosecutor's object in producing it; and, (2.) that it was not competent to prove by this witness, that any map in the volume is by Delisle—the author of the map libelled on.

LORD COCKBURN.—It is competent to libel on fifty watches or fifty penknives, and then to produce any one watch or penknife. The objection just is, that the production is not sufficiently described.

LORD MEADOWBANK.—I remember a case in this Court, in which I was in the minority. A pair of shoes was libelled on,—five pairs were produced. The Court held that the public prosecutor might take any pair of the five that he chose, and found upon it as the pair described in the Indictment.

The objection was repelled, and the volume of maps shown to the witness.

5. The same witness, in order to prove the date of the appointment of Guillaume Delisle to the office of "Premier Geographe du Roi," produced an extract, which he had himself made, from the Register of the Secretary of State of France, and which was libelled on as a production.

ANDERSON, for the pannel, objected to the production of this extract.—What is tendered in evidence is a copy taken from an entry in a foreign register, and there is no evidence laid before the Court, that by the law of France, and in the opinion of French lawyers, this register is genuine, or would be received as an authentic register in the courts of France. The authority which any register in this country bears in courts of law, depends on the regularity with which it is kept. The records of births and baptisms were not received as evidence till very recently, because they were not so kept as that confidence could be placed in them as genuine records; and they are only now received and admitted as evidence in courts of law, when the party who keeps them is present to prove them to be

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genuine, and satisfy the Court that they have been regularly kept. An extract from the register of sasines is received in evidence, only because the Court knows that by legislative authority such a document is probative, and will bear faith in judgment. But in the case of the register of a foreign country, the court must be satisfied as to the general accuracy of the record, and that it is so received in that country. Looking to the application of this principle here, it must be proved (1.) that the register from which this extract is taken, is such as would bear faith in a court of justice in France, and (2.) it must be proved, by the evidence of French lawyers, that this document would, by the law of France, be considered legal evidence of what is contained in the register. The only evidence tendered to establish the fact of Delisle's commission, is a document which the witness says he wrote himself. No proof is tendered that this would be sufficient evidence by the law of France, or that an attempt to found on such evidence would be supported by a judgment of a foreign court. The question was decided in the civil court, in the case of Robertson *v.* Gordon, 15th November, 1814. The rubric of that case is, " An exemplification of a foreign judgment, attested to be a true copy by the officer of Court, and bearing the chief-justice's seal, is not *per se* good evidence that such judgment had been pronounced." The case arose thus. The pursuer founded on an exemplification, which she affirmed to be a true copy of a judgment obtained by her against the defender in the Island of Granada, to be attested as such by the proper officer of the foreign court, and to bear the seal of the chief-justice for the time; and she argued that, in such circumstances, this document was conclusive without further proof. The defender contended that the copy could not be received in Court, as good evidence of the fact that such judgment had ever been pronounced. " The Court ordered the opinion of English counsel to be taken on a joint case prepared by the parties. The opinions of Sir Arthur Pigott and Sir Samuel Romilly were decidedly

that the exemplification of the judgment was not duly and sufficiently authenticated, and would not, without further evidence, be admissible in a court of law in England." The proceeding here adopted is not at all an unusual one, and the whole course of practice is in its favour. Mr. Burnett says (page 483), "When the record of a foreign court is founded on, it must be verified agreeably to the forms in use in that country. Thus a copy, or an exemplification of a record of an English court, is not received with us, unless it be under the seal of that court, which is the usual form of authenticating copies of records by the English law. . . . . Accordingly, in the case of William Deans, for coining, an objection having been taken to a witness, that he had been pilloried in Ireland for a similar crime, and so was an infamous person; and a copy of the judgment in the King's Bench in Ireland, signed, as was said, by the proper officer, having been offered in evidence of the objection, it was contended that it was inadmissible, not being an exemplification under the proper seal. The Court gave effect to this, and rejected the copy, in consequence of which the witness was received." And the law is laid down precisely to the same effect by Mr. Alison, Vol. ii. page 599.

The LORD ADVOCATE, for the prosecution, suggested that the witness should be examined as to his knowledge of the authenticity of the register, and of the practice of French courts.

The witness, who had gone through a course of legal study in the University of Paris, and was a licentiate of law, was accordingly examined on these points, and stated, that the register from which the extract libelled on was taken, was an authentic record, and the proper and only register in which the grant in favour of Delisle, as "Premier Geographe du Roi," could be recorded—that he was himself one of the keepers of this register—and that the extract was in the regular and common form, and would be received as evidence in a French court.

After this evidence, the objection to the production of

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the extract was withdrawn. But an opinion was indicated from the Bench, that even independently of that evidence, the Court would have doubted the soundness of the argument maintained for the pannel.

6. Several of the witnesses for the prosecution had been brought from Paris, under an agreement regularly reduced to writing, that besides their expenses, they were to receive payment at the rate of L.40 per month, for the period of their absence. One of these witnesses was a shoemaker, who stated in his examination *in initialibus*, that his profits from his trade amounted to about 200 francs (L.8.) a month. He had been nearly three months absent from Paris.

ROBERTSON and ANDERSON, for the pannel, objected to the admissibility of this witness, on the ground, (1.) that any payment made to a witness beyond his necessary expenses, is of the nature of a good deed, and tends to disqualify him, (Alison, Vol. ii. p. 498,[1]) and (2.) that the amount of payment in this particular case was excessive, as it was at the rate of L.480 a year; and the witness before he returned home would receive L.120 sterling, besides his expenses.

The LORD ADVOCATE, for the prosecution, answered, —the rule laid down by Mr. Alison refers to witnesses resident in this country, and would probably be held to extend to England also, now that, by recent statutes, witnesses from England may be compelled to attend and give evidence in Scotch courts; but it cannot apply to foreign witnesses, over whom the court possesses no *compulsitor*.

LORD MACKENZIE.—To lay down the rule, that nothing is to be paid to a foreign witness beyond his neces-

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[1] "As every witness must, sooner or later, be paid his travelling expenses "for coming to the trial, it follows that he is not to be considered as "disqualified, or even suspected, if he has received a sum of money "adequate, *and not more than adequate*, for that purpose, either from "any of the public authorities, or the private party injured."

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sary expenses, would just be to decide, that no foreign witness can be brought to give evidence in this Court. A witness cannot come here from a foreign country without expense and loss; and it is impossible for us to apply to such a case the rule of law laid down by Mr. Alison; nor does there appear to me the least reason why we should. A witness in this country being bound by law to attend and give evidence when required, more than his necessary expenses is not allowed. But it is quite plain that foreign witnesses, living beyond the jurisdiction of the Court, are in a totally different position. Then if it is lawful to give indemnification to persons in that situation, I do not see that the indemnification here given is excessive, or such as can exclude the witness. He is making 200 francs per month of profit in his trade. He has a family, and resides in Paris. He knows nothing of Scotland, where he is a stranger—ignorant even of the language of the country, and probably entertaining towards it some of the horrors of foreign prejudice. The question is, if an offer of 1000 francs per month for the period he may be detained here be excessive. I do not think it is so, especially for a single month; and it is not likely that his stay would have extended beyond that, had not the trial been postponed—which postponement took place on the application of the pannel himself. I do not think that the Public Prosecutor has done any thing that is unfair, or that the sum which he has stipulated to give is so unreasonable, as to affect the testimony of this witness. I do not lay down the rule that any sum, however large, may be given to a foreign witness; because if he received an enormous sum, there would arise a suspicion that it was given for an undue purpose. But the sum here stipulated for is not of such an amount as to produce any suspicion. The witness himself asked that sum, and would not take less. I think most men in his situation would have done the same. A man is not obliged to leave his trade merely for what his trade would bring. This witness leaves his family—he undertakes the fatigue and risk of a journey

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—and submits to all the inconvenience which must result from his leaving home. For all this he expects, and justly expects, to be liberally remunerated. I do not think that the Public Prosecutor has gone too far in regard to the amount of remuneration, and I therefore see no reason for holding the witness disqualified.

LORD MONCREIFF, I am of the same opinion. The rule of our law is very important, to exclude witnesses who have had such communications with either party, as to influence their evidence by expectation of reward. But if we were to sustain such an objection as that taken here, the result would be inevitable; that this Court could never try a case which depended on the evidence of persons residing in a foreign country, and especially of *poor* persons residing in a foreign country: for they, being under no compulsion to come here, may say they will not come, unless arrangements be made to recompense them amply for any loss they may sustain in ther trade or family affairs. And there is another principle in our law equally important—that, namely, which regards with no favour ultroneous witnesses. If this witness had come here without any stipulation as to his remuneration, I think his testimony would have been more suspicious; because not being under any obligation to come, if he had come without any previous arrangement, it might have been an objection, that he must have some other motive than the ends of justice. What is the case here? There is no indefinite bribe, or promise of reward, for the evidence the witness is to give. There is a specific written agreement entered into, and the witness would not have come if such an agreement had not been made. If the Public Prosecutor had not entered into that agreement, he would not have got this French witness, upon whose testimony, it may be, his whole case depends. There is no unfair dealing here. Every thing is above board. It is not a rule for any case, that nothing is to be given beyond mere expenses. There may be a case of clear excess of payment sufficient to influence the mind of the man; and

if it were so here, his evidence should not be received. But what is the case here? The witness is a shoemaker in Paris, earning a comfortable livelihood, and he is offered a sum, certainly much greater than he is making by his business, to induce him to come here and give evidence in this trial. Was it to be thought that the Crown agent was to offer him no more than he was making by his trade, in order to induce him to give it up, to leave his wife and family in France, and to come here? The thing is impossible: he insists for more; and they accordingly make a stipulation with him that he shall receive 1000 francs a-month. He comes here accordingly, resting on the agreement that he shall receive that sum, and expecting no more than that payment for a single month. And when the counsel for the prisoner reckons up what may be ultimately payable to this witness, it should be remembered that the additional amount of payment to which he will be entitled, is the necessary consequence of his own proceeding, in moving for a delay of this trial. The witness has been kept here for a much longer period than was originally anticipated, and is in danger, when he returns to France, of losing his trade altogether; and now this objection is taken, that the crown have agreed to give him what is an unreasonable sum, and may bias his testimony. I cannot attend to such a plea; and I say that there never was a case tried in this Court, or in the civil court, where it was necessary to bring witnesses from abroad, in which they were not paid more than their expenses. And where there is no *compulsitor* I have no hesitation in saying, that there would not be the means of administering justice, if the testimony of a person in the situation of this witness were not to be received in evidence. I am, therefore, very clearly of opinion, that the evidence of this witness should be received. If the counsel for the prisoner think it right to make any observations as to his credibility, they can do so. The Jury will judge, how far this agreement betwixt him and the public Prosecutor may affect the credit which will attach to

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Forgery.

his testimony. I do not think that it ought to affect his credibility at all; and I think, on the contrary, that he is a far more unexceptionable witness, than if he had come here without making such an arrangement.

LORD COCKBURN.—I concur entirely in every word that has been said, and I have little to add to what has been so forcibly stated. The question here regards not the credibility of the witness, but his admissibility. I do perfectly agree with Lord Moncreiff in this respect, that his credit would have been less with me, if he had come here without his price, or plainly for an inadequate price. The rule of law is, that nothing shall be done which corrupts, or tends to corrupt the witness, or which shows an intention to corrupt him; for if the design of corrupting him is formed, though the attempt should be unsuccessful, the witness would not be received. Now, is there any thing in the facts here, to induce us to form an opinion that the witness has received a bribe? It is idle to say that the payment he is to receive is at the rate of L.480 a-year. A country apothecary, who may be a very poor man, generally gets two guineas a day when called upon to give evidence in this Court; but I should be surprised to hear a counsel object to such a witness,—you are paying him far too much, you are paying him at the rate of L.800 a-year. Looking at the facts of the case, I am not sure that this man has made a good bargain: I think a judicious friend in Paris would have said to him, you had better stay here than go to Scotland on such terms. But whether this be so or not, there is an element in the case not to be lost sight of; namely, the fact that we have no power over a foreign witness. The question is, not whether this man has made an unreasonable demand; but the question is, was it unreasonable in the party who was at his mercy to comply with this demand? Suppose the case of a man accused of murder, who knows he is innocent, and that he can prove his innocence by the testimony of a witness residing in France; but he cannot get the testimony of that witness, which is necessary to esta-

blish his defence, and even to save his life, by citing him in the ordinary way, and he is only to be brought over to this country by giving him a sum of money. Would it be an objection in such a case to say, that the witness had been unreasonable in his demand of remuneration? I repeat again that the payment given here is not unreasonable, or such as can be supposed to have a corrupt influence on the mind of the witness. He is not to be paid according to the testimony he is expected to give. He has made a legal bargain, and had it engrossed on stamped paper, and he is as independent of the Lord Advocate in that respect as the Lord Advocate is of him.

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LORD MEADOWBANK.—I am quite of the same opinion that the evidence of this witness is admissible. I have no doubt of it whatever.

The objection was accordingly repelled.

7. Among the productions in the process of reduction of the pannel's services, (the whole of which process was libelled on,) was a paper bearing to be an affidavit made by one Henry Hovenden, in the year 1723, before one of the Barons of Exchequer, in Ireland. The note of the Lord Ordinary, which had been read to the Jury on the part of the prosecution, contained comments on this affidavit. Appended to the affidavit was a writing, of the same date, bearing to be the attestation of one Thomas Conyers to the truth of the statement by Hovenden, and also containing information in regard to the alleged charter of *novodamus* in favour of the first Earl of Stirling.

May 1 1839.

In the course of the exculpatory evidence, ROBERTSON, for the pannel, proposed to adduce a witness to prove the handwriting of Thomas Conyers, and argued, that after having done this, he would be entitled to read to the Jury the paper bearing his signature, and that for the purpose, (1.) of counteracting the effect of the Lord Ordinary's note; and, (2.) of proving the existence in 1723, of documents referring to the charter of *novodamus*.

The SOLICITOR-GENERAL, for the prosecution, answered,—even if the handwriting of Thomas Conyers was

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proved, the attestation signed by him is not admissible in evidence, as not being the least proof of the authenticity of Hovenden's affidavit.

The Judges retired to consult together on the point thus raised. On their return, the judgment was thus announced :—

LORD MEADOWBANK.—The Court are of opinion that the counsel for the pannel are entitled to prove the handwriting of Thomas Conyers, and that, if it is proved, the attestation to which it is appended may be read, but not to the effect of proving the truth of any fact which it sets forth.

ROBERTSON.—Then it cannot be read to the Jury.

LORD MEADOWBANK.—We do not say that it may not be read, but that it cannot be read to prove a fact.

ROBERTSON.—It is proof that Conyers signed this attestation.

LORD COCKBURN.—But not that he did so in good faith.

After this judgment, the counsel for the pannel declined occupying the time of the Court by proving the handwriting of Conyers.

8. Mr. Ephraim Lockhart, one of the witnesses for the prosecution, having proved that he received the excerpt charter libelled on from the pannel at Worcester, in May 1829; and also, that the first information which he had of its existence, was contained in two letters received by him in April of that year, from one Banks, an agent of the pannel's; the handwriting of which he proved,—

ROBERTSON, for the pannel, moved the Court that these letters should be read to the Jury.

The SOLICITOR-GENERAL, for the prosecution, answered.—Banks had been proved to be alive, and therefore should have been examined, to prove the letters.

The motion was refused; as was also a similar proposal regarding various letters from Banks to the pannel, the handwriting of which had been proved, and the postmarks admitted.

May 3 1839. 9. The Jury returned the following verdict :—

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"The Jury unanimously find it proved that the excerpt "charter libelled on, is a forged document, and by a "majority find it not proven, that the pannel forged the "said document, or is guilty art and part thereof, or that "he uttered it, knowing it to be forged.

"Unanimously find it proved, that the documents on "the map libelled are forged, and by a majority, find it "not proven that the pannel forged the said documents, "or is guilty art and part thereof, or that he uttered them, "knowing them to be forged.

"Unanimously find it not proven, that the documents "contained in De Porquet's packet are forged, or were "uttered by the pannel as genuine, knowing them to be "forged.

"Unanimously find it not proven, that the copy letter "to Le Normand in the fifth and last charge of the Indict-"ment is either forged, or was uttered by the pannel as "genuine, knowing it to be forged."

After the Chancellor had delivered the verdict of the Jury, the pannel fainted, and was carried out of Court to an adjoining room.

ANDERSON afterwards stated to the Court, on the authority of a medical gentleman who was attending the pannel, that it would be dangerous to bring him back into Court, and that a second attack of his indisposition might be the consequence of doing so.

The Court, with the consent of the Public Prosecutor, and in respect of the result of the verdict, dispensed with the pannel's attendance. And, in respect of the foregoing verdict of Assize, he was assoilzied *simpliciter*, and dismissed from the Bar.

May 20
1839.

Present,

THE LORD JUSTICE-CLERK,

LORDS MEADOWBANK, MACKENZIE, MONCREIFF, COCKBURN.

HER MAJESTY'S ADVOCATE.—*Sol.-Gen. Ivory—Handyside.*

AGAINST

ROBERT YOUNG—*Craufurd.*

CULPABLE HOMICIDE—NEGLIGENT MANAGEMENT OF MACHINERY.—1. A workman employed in the management of a diving bell, by whose alleged neglect of duty two lives were lost, indicted for culpable homicide; and an objection to the relevancy of the Indictment, to the effect that the presence of the pannel, at the time the deceased entered the bell, was not sufficiently set forth, repelled.

2. Question, whether culpable and negligent management of machinery, "whereby the safety of the lieges is put in danger," without any *result* being set forth, is an indictable offence.

No. 63. Robert Young.

Culpable Homicide.

ROBERT YOUNG was indicted to stand his trial at the Ayr Spring Circuit, on an Indictment charging him alternatively with the crime of Culpable Homicide, or the Culpable and Negligent Management, by a workman, of Machinery or Mechanical Apparatus under his charge, or the Culpable and Reckless Neglect of Duty, by a workman, in the Management or Use of Machinery, or Mechanical Apparatus, whereby lives are lost, or bodily injuries suffered, or the safety of the lieges put in danger;

IN SO FAR AS, the said Robert Young, being in the employment of the Commissioners for improving the Harbour of Portpatrick, in the capacity of chief bell-director, and it being his duty to take charge of, and superintend the shifting, when ordered, of the diving-bell employed in the operations carrying on at said harbour, and to give the necessary directions to the persons associated with him in the performance of the duty of shifting the diving-bell, and to see that the duty was performed, and that the diving-bell was properly shifted before being again used or worked; and, in particular, it being his duty, as chief bell-director, or

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Culpable Homicide.

as charged, for the occasion, with shifting the position of the diving-bell, and seeing it done, to take especial care that the counterbalance to the diving-bell was properly shifted, and its place changed as need might be, so as to enable the diving-bell to be safely used in its altered position, and to see that the counterbalance was so shifted and changed, before the diving-bell was allowed to be used in its altered position; and he being well aware that it is indispensably necessary, in order to the diving-bell being used in a new and altered position, with safety to the persons entering the said diving-bell, in order to be lowered therein, and to the persons employed in working the machinery to lower the said diving-bell in its new position, and to other persons employed in the near neighbourhood of the diving-bell, or of the machinery and apparatus connected therewith, that the counterbalance to the diving-bell should have been previously shifted in correspondence with, or in relation to the new and altered position of the diving-bell; and that by neglecting or failing so to shift the counterbalance to the diving-bell, the other machinery and apparatus connected with the diving-bell would become unmanageable as soon as an attempt should be made to use the diving-bell in its altered position, and the diving-bell itself, and the carriage, winches, and machinery and apparatus designed and necessary for using the diving-bell, would be overset, to the loss, or to the great danger, of the lives of such persons as might enter, or be entering the diving-bell, and such persons as might attempt to work, or were preparing to attempt to work the machinery and use the apparatus connected therewith, and of all persons in the neighbourhood of the diving-bell, its machinery, and apparatus: Nevertheless, the said Robert Young, on the 27th of July 1838, being then employed as chief-bell director aforesaid, at the harbour of Portpatrick aforesaid, having received orders from James M'Clymont, chief diver to the said Commissioners, to shift the diving-bell from the cross wall to the outer or west wall of the north pier at Portpatrick aforesaid, and having, in obedience to these orders, given instructions to Thomas Boyd and Henry Hendry, winchers, or other persons to the prosecutor unknown, acting under his directions, to shift the diving-bell to the said outer or west wall, and they having accordingly done so under his immediate superintendence or direction, and the diving-bell having been accordingly altered in its position, he did fail and neglect to order the metals constituting the counterbalance to the diving-bell to be at the same time or thereafter shifted, or at least to superintend the shifting of them, and to see that they were duly and properly shifted, so that there should be and exist the proper and necessary counterbalance to the diving-bell when it came to be used in its new position; and he did, reckless of the consequences, suffer and permit the diving-bell to be placed or suspended in its new and altered position, and did himself leave the carriage or framework from which, or in connection with which, it was suspended, and did allow and give leave to the winchers, or other workmen acting under his orders, to

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leave their posts, without giving warning and making it known to the various persons engaged in using or about to use the diving-bell, or assisting those engaged in using or preparing to use the diving-bell, or in working the machinery and apparatus belonging to or connected with the diving-bell, that the counterbalance had not been shifted, and the diving-bell was not ready and prepared to be used in its altered position, and he did leave the harbour or pier for some time, and having returned thereto, and the counterbalance still remaining unshifted, and the said James M'Clymont, and other workmen belonging to the diving-bell, being about to enter the same in order to its being lowered into the sea and used in its new and altered position in the operations carrying on at said harbour or pier, trusting and confiding in his having performed his duty as aforesaid in shifting the diving-bell and its counterbalance, and that the said diving-bell might be safely used in its altered position, and the other workmen employed, or about to be employed, in working the machinery connected with the lowering of the diving-bell, or with its being put to use, having proceeded to take their places, and to lower, or to prepare to lower, the diving-bell, and he being present and cognizant of these proceedings, he did contrary to his duty, culpably neglect to ascertain whether the counterbalance had been shifted, and to see that it was shifted, or to warn the workmen about to enter the diving-bell, and the other workmen and other persons engaged in assisting in putting the diving-bell to use, that the diving-bell, or the machinery or apparatus connected therewith, was not in a proper state to be used, by reason that the counterbalance had not been shifted; and by his said reckless, negligent, and culpable conduct and failure in the duty required of him as aforesaid, as chief bell-director, as soon as the said James M'Clymont and William Campbell, diver, and John Maltman, labourer, who had proceeded in a boat for that purpose, had entered the diving-bell, the carriage, winch, or winches, or other machinery and apparatus connected with the said diving-bell were overset, on account of the diving-bell and counterbalance acting together, instead of being opposed to each other, and the carriage, winch, or winches, or other machinery and apparatus, and the diving-bell itself, were instantaneously plunged into the sea; and Alexander M'Culloch, boatman, who had been employed in conveying the said James M'Clymont and others in a boat to the diving-bell, having been struck by the said diving-bell or carriage, or some of the apparatus, had his skull fractured and was killed; or otherwise, the said boat being struck by the said diving-bell or carriage, or some of the apparatus, the said Alexander M'Culloch was thereby thrown into the sea and was drowned; and Henry Hendry, wincher, then residing in Portpatrick aforesaid, who was standing on the said carriage, and working, or preparing to work, one of the winches, was, by the overturning of the said carriage, or otherwise, thrown into the sea and was drowned; and Robert Byres, labourer, now or lately residing in

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Portpatrick aforesaid, who was in the said boat, was struck by the said diving-bell, or machinery or apparatus, and received a compound fracture of his right leg near the ancle joint; and William M'Nair, labourer, now or lately residing in Portpatrick aforesaid, who was likewise in the said boat, was struck by the said diving-bell, or machinery or apparatus, and had his left clavicle fractured, and received wounds on his head and one of his fingers; and John Hendry, labourer, now or lately residing in Portpatrick aforesaid, Joseph Hannay, labourer, now or lately residing at Port of Spittal, parish of Stoneykirk and county of Wigtoun, Peter Henderson, labourer, now or lately residing in Portpatrick aforesaid, George Ritchie, labourer, now or lately residing at Townland of Cunningburn, in the parish of Newtonards, county Down, Ireland, who were severally on the said carriage, in the discharge of their respective duties, were, by the overturning of the said carriage, plunged into the sea, and they were severally injured by blows from the said carriage, machinery, or apparatus, or by being thrown into the sea; the said John Hendry having his right shoulder dislocated, his right leg fractured between the knee and ancle joints, and being otherwise bruised; the said Joseph Hannay being wounded in two places upon the face; the said Peter Henderson having received a concussion of the brain and a contusion in his body; and the said George Ritchie having one or more of his ribs fractured, and being otherwise bruised in his body; and William Lightbody, labourer, now or lately residing at Lisbarnet, parish of Kilinsha, county Down, Ireland, and now or lately in Portpatrick aforesaid, and Thomas Boyd, labourer, now or lately in Portpatrick aforesaid, and now or lately residing in Donaghadee, parish of Donaghadee, county Down aforesaid, who were likewise on the said carriage in the discharge of their respective duties, were, by its overturn thrown into the sea, and their lives endangered; and the said Alexander M'Culloch and Henry Hendry were thus bereaved of life by the culpable and reckless neglect of duty and conduct as aforesaid, of the said Robert Young; and the said Robert Byres, William M'Nair, John Hendry, Joseph Hannay, Peter Henderson, and George Ritchie were severally injured in their persons as before mentioned, and their lives endangered; and the said William Lightbody and Thomas Boyd had their lives put in danger, all by the culpable and negligent management, and reckless neglect of duty of the said Robert Young, after shifting the said diving-bell, leaving the counterbalance thereto to remain unshifted as aforesaid.

An objection having been taken to the relevancy of the Indictment, the Lord Justice Clerk certified the case, which came on for discussion this day.

CRAUFURD, for the pannel, objected, (1.) to the 2d charge in the major proposition, which sets forth, as the

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consequence of the culpable and reckless neglect, not merely the loss of life, and the infliction of bodily injury, but also *danger to the safety* of the lieges. The three results are put alternatively, being connected by the word *or*, and therefore the pannel is charged with culpable and reckless neglect, whereby the safety of the lieges is put in danger. This charge is not relevant. In order to constitute a crime punishable by law, there must be a result produced or intended. No intent is set forth, and an unintentional *act*, however culpable, is not indictable without a *result*. Thus furious driving, or riding, if no one is injured, is merely a police offence, and has never been otherwise considered. (Alison, Vol. I. p. 625.) The case of culpable *neglect* leading to no *result*, and occasioning no injury, is still stronger, and has never been indicted as a substantive offence. It is true, that if a collision takes place, though no lives are lost, negligent steering or driving is punishable, but then there is a *result*, and danger, not merely to the safety, but to the lives of the lieges. (Alison, Vol. I. p. 627.) (2.) The minor proposition is objectionable, in as much as it does not state, with sufficient precision, that the pannel was present when the deceased actually entered the bell; and his presence, at that time, was essential to the constitution of the crime.

HANDYSIDE, for the prosecution, answered,—The presence of the pannel, at the time the deceased entered the bell, is stated in the Indictment; the words, "and "you being present and cognisant of these proceedings," applying to the entering into the bell, as well as to the preparations previously made. On the first objection, substantial, not merely speculative, *danger*, is sufficient to justify the indictment of culpable neglect. The case of running down a boat, though no life is lost, and no injury done, is an illustration of this; and many others might be given. The narrative here shews that there must have been real and imminent danger occasioned by culpable and reckless neglect. This case afforded a favourable opportunity of obtaining the opinion of the Court on the relevancy of such a charge;

and the charge had been inserted in the major proposition with this view, for it was not essential to the case, as death and severe injuries had, in point of fact, occurred. No. 63. Robert Young, May 20 1839.

The Court recommended that the words, " or the safety of the lieges put in danger," should be struck out of the Indictment, their Lordships observing, that they were not in the practice of deciding a speculative point, which was acknowledged in the circumstances to be unnecessary to sustain the graver charges libelled in the major proposition. They repelled the second objection, being of opinion that the presence of the pannel, at the time when the deceased entered the bell, was sufficiently set forth. Culpable Homicide.

The SOLICITOR-GENERAL, for the prosecution, then consented that the words, " or the safety of the lieges put in danger," should be struck out of the Indictment, which was accordingly found relevant; and, on the motion of the Solicitor-General, the diet against the pannel was deserted *pro loco et tempore*.[1]

CHARLES MILLOY, Suspender---*D. F. Hope.*

AGAINST

JAMES SNEDDON, Respondent---*M'Neill.*

SUSPENSION AND LIBERATION---STATUTE, 4TH GEO. IV. c. 34. 1. A judgment of the Justices of the Peace, under the above statute, is not subject to any review on the merits.

2. Reasons of suspension founded *inter alia* on the vagueness of the complaint, repelled.

ON the 27th November 1838, the Respondent, an iron stone contractor at Airdrie, with concurrence of the procurator-fiscal, presented a complaint to the Justices of the No. 64. Milloy *v.* Sneddon, May 20 1839.

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[1] The pannel was brought to trial before Lord Meadowbank, at the Circuit Court of Justiciary, held at Ayr on the 25th of September 1839, when the libel was found not proven. Susp. and Lib.

No. 64. Milloy v Sneddon, May 20 1839.

Susp. and Lib.

Peace for the county of Lanark, setting forth, that "Charles Milloy, iron-stone miner or labourer, Airdrie, "did enter into the private petitioner's service, and con- "tinued to work thereat for some time, subject to the "rules and regulations of the private petitioner's work; "but the said Charles Milloy did, on the 30th day of "October last, desert the private petitioner's employment, "without giving the requisite notice, in terms of the re- "gulations of the private petitioner's work, and in terms "of the act 4th Geo. IV. c. 34, § 3, contrary to enact- "ments contained therein."[1] The petition prayed the Justices to take the petitioner's oath, and thereafter to

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[1] It is enacted by this section of the statute, "That if any servant in "husbandry, or any artificer, calico printer, handicraftsman, miner, "collier, keelman, pitman, glassman, potter, labourer, or other person, "shall contract with any person or persons whomsoever, to serve him, "her, or them for any time or times whatsoever, or in any other man- "ner, and shall not enter into or commence his or her service, accord- "ing to his or her contract, (such contract being in writing and signed "by the contracting parties), or, having entered into such service, shall "absent himself or herself from his or her service, before the term of "his or her contract, whether such contract shall be in writing or not in "writing, shall be completed, or neglect to fulfil the same, or be guilty "of any other misconduct or misdemeanor in the execution thereof, or "otherwise respecting the same, then, and in every such case, it shall "and may be lawful for any Justice of the Peace of the county, or place "where such servant, &c. shall have so contracted, or be employed, or "be found, and such Justice is hereby authorised and empowered, upon "complaint thereof made upon oath to him by the person or persons, "or any of them with whom such servant, &c. shall have so contracted, "or by his, her, or their steward, manager, or agent, which oath such "Justice is hereby empowered to administer, to issue his warrant for the "apprehending every such servant, &c. and to examine into the nature "of the complaint: and if it shall appear to such Justice that any such "servant, &c. shall not have fulfilled such contract, or hath been guilty "of any other misconduct or misdemeanor as aforesaid, it shall and may "be lawful for such Justice to commit every such person to the house "of correction, there to remain, and to be held to hard labour for a rea- "sonable time not exceeding three months, and to abate a proportion- "able part of his or her wages for and during such period as he or she "shall be confined in the house of correction, or, in lieu thereof, to

"grant warrant to apprehend and bring before you or "any of your number, the person of the said Charles "Milloy for examination: and on the facts above stated "being admitted, or proven, to convict the said Charles "Milloy of the offence of a breach of engagement, and "desertion of service herein above set forth, and to grant "warrant to commit him to the house of correction, to be "kept to hard labour for such length of time as your ho-"nours may think fit, in terms of the foresaid act of Par-"liament, 4th Geo. IV." Along with this complaint was produced a copy of the regulations, said to be observed at the Respondent's works, by which *inter alia* the workmen were bound to give a month's warning before quitting their employment, and the masters a similar notice before dismissing their workmen. On advising the complaint, with the Respondent's oath, the acting Justice granted warrant to apprehend the Suspender, "and to bring him be-"fore any of her Majesty's Justices of the Peace for ex-"amination, and to be dealt with according to the statute." The Suspender was accordingly apprehended and taken before another Justice, when he admitted that "he en-"tered into the petitioner's service, and left the same "upon the date mentioned in the complaint, but when he "did so he had previously given and wrought a fourteen "days warning, but not a month's warning, as required "by the petitioner."

One witness was examined as to the conditions under which the Respondent's workmen were engaged. After which, the Justice found the complaint proven, and granted warrant to commit the Suspender to the Jail or Bridewell at Hamilton, there to be detained at hard labour for the period of thirty days.

Milloy having been incarcerated under this sentence,

"punish the offender by abating the whole, or any part of his or her "wages, or to discharge such servant, &c. from his or her contract, ser-"vice, or employment, which discharge shall be given under the hand "and seal of such Justice, *gratis*.

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presented a bill of suspension and liberation on the following, among other grounds, (1.) The complaint was vague and irrelevant, and did not set forth the terms of the alleged contract, or of the regulations of the Respondent's work which the Suspender was said to have infringed; (2.) The object of the proceedings was to extort money from the Suspender, and they had no foundation in fact; (3.) There was no evidence against the Suspender, and the warrant of imprisonment was issued without allowing him an opportunity of being heard in his defence, or of leading proof.

The Respondent answered, (1.) The complaint was quite distinct, and referred to the regulations of the work, which were produced along with it; (2.) The fact of the Suspender having deserted from his service was made out to the satisfaction of the Justice, (which is all that the statute requires), by his own declaration, and by the evidence of the witness examined.

THE DEAN OF FACULTY, for the Suspender, argued,—that there was no sufficient proof that the alleged regulations were adopted in the Respondent's works, or that they formed the contract under which the Suspender was engaged.

M'NEILL, for the Respondent, answered,—the judgment of the Justices is not liable to review on the merits. The statute does not require that all or any of the evidence should be reduced to writing. Conviction is competent "*if it shall appear* to such Justice," that the party is guilty, and it is specially provided, (§ 5), that "every "order or determination of such Justice or Justices shall "be final and conclusive." The Court have frequently overturned sentences of Justices of the Peace under this act; but this has always been in cases in which the statute has been disregarded on points of form. An instance of this occurred in the case of Crawford *v.* Wilson and Jamesons, November 19, 1838, (Swinton, Vol. II. p. 200), in which the Lord Justice-Clerk expressed himself as "quite clear that the judgment of the Justices is not re-"viewable on the merits."

The DEAN of FACULTY, for the Suspender, answered, —In the other cases which have been decided under this statute, the irregularities in point of form have been sufficient to set aside the judgment. The statute does not exclude the review of the Supreme Court. Neither does it authorize evidence to be taken *viva voce* without being reduced to writing. And in the absence of such a provision, the ordinary forms before inferior courts in this country cannot be disregarded.

No. 64. Milloy v. Sneddon, May 20 1839.

Susp. and Lib.

The Court refused the bill, with expenses.

JOHN CULLEN, W.S.—WOTHERSPOON & MACK, W.S. *Agents.*

JOHN DUTHIE, Suspender—*Monro.*

AGAINST

CHARLES BIRNIE, Respondent—*Robertson—Cook.*

SUSPENSION AND LIBERATION—STATUTE 4TH GEO. IV. c. 34—WARRANT—PROCESS—1. A Bill of Suspension of a judgment under the above statute, on the grounds (1.) that the apprentice complained against was not proved to fall within the meaning of the acts therein recited, (2.) that the charge was not sufficiently specific, and, (3.) that the evidence was not conclusive, refused.

2. An apprentice having been convicted of desertion, under the above statute, and sentenced to one month's imprisonment, and he having absconded before this sentence was carried into effect, and having been apprehended two months afterwards, without a warrant, and carried before the Justice by whom the former sentence was pronounced—held, that it was competent for the Justice, without any petition being presented for the application of the former judgment, to find the apprentice guilty of deserting, and of not returning to his service, and to sentence him anew to one month's imprisonment.

ON the 7th of November 1838, the Respondent, a merchant and ship owner in Montrose, for himself and the other owners of the brig Henry of Montrose, presented

No. 65. Duthie v. Birnie.

No. 65. Duthie v. Birnie, May 20 1839.

Susp. and Lib.

to the Justices of the Peace for the county of Forfar, a petition, under the act 4th Geo. IV. c. 34.[1] setting forth, that by an indenture, bearing date the 13th of February 1838, entered into between the owners of the Henry on the one hand, and the Respondent and his father on the other, the Respondent had bound himself an apprentice to serve for four years on board of the said vessel, and had continued to serve therein till the 30th of October following, when he deserted and absconded from the vessel while lying in the harbour of Dundee, and ready for sea, and was then in or about Montrose. The petition prayed the Justices to grant warrant to apprehend the Suspender and bring him before them—" and upon proof or con-
" fession of the premises, to grant warrant to commit him
" to the jail or tolbooth of the burgh of Montrose, (there
" being no house of correction within the district) therein
" to remain until he shall return to the service of the
" petitioner, and continue therein until expiry of his in-

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[1] By this act, entitled, " An act to enlarge the powers of Justices " in determining complaints between masters and servants, and be- " tween masters, apprentices, artificers, and others," it is enacted (§ 1.) after reciting the acts 20th Geo. II. c. 19, 6th Geo. III. c. 25, and 4th Geo. IV. c. 29, " That it shall and may be lawful, not only for any " master or mistress, but also for his or her steward, manager, or agent, " to make complaint upon oath against *any apprentice within the* " *meaning of the said before recited acts*, to any justice of the peace of " the county or place, where such apprentice shall be employed, of or " for any misdemeanour, misconduct, or misbehaviour of such appren- " tice, or if such apprentice shall have absconded, it shall be lawful for " any justice of the peace of the county or place where such apprentice " shall be found, or where such apprentice shall have been employed; " and any such justice is hereby empowered, upon complaint thereof, " made upon oath by such master, mistress, steward, manager, or " agent, which oath the said justice is hereby empowered to administer; " to issue his warrant for apprehending every such apprentice; and, " further, that it shall be lawful for any such justice to hear and deter- " mine the same complaint, and to punish the offender by abating the " whole or any part of his or her wages, or otherwise by commitment " to the house of correction, there to remain, and be held to hard la- " bour, for a reasonable time, not exceeding three months."

"denture, or to commit him to the jail or tolbooth of the "burgh of Montrose, there to remain, and to be held to "hard labour, for three months." Upon this petition, a warrant for the Suspender's apprehension was granted by Patrick Mason, Esq., one of the Justices of the Peace for Forfarshire, before whom the Suspender accordingly appeared, on the 8th of November, accompanied by a professional gentleman acting as his agent; and emitted a judicial declaration, in which he admitted the facts of his apprenticeship and desertion; but alleged, as his reason for deserting, ill-treatment by the mate of the vessel. On this evidence the Justice found the desertion proved, and the reason assigned by the Suspender for leaving his service insufficient, and granted "warrant to commit the "said John Duthie to the tolbooth of Montrose, therein "to remain for one calendar month from this date." This warrant was not put in execution, in consequence, apparently, of an agreement by the Suspender's father to pay the expenses which had been occasioned by his desertion, and under an understanding that he was to return to his service. Neither of these conditions was fulfilled, and, on the 28th of January 1839, the Suspender was apprehended without a warrant, by an officer acting under the authority of the Respondent, and again taken before Mr. Mason, when the following procedure took place:—

"At Montrose, the 28th day of January 1839. In presence of "Patrick Mason, Esq. one of Her Majesty's Justices of the Peace for "the county of Forfar, appeared Charles Birnie, merchant in Montrose, "the petitioner; appeared, also, John Duthie, the apprentice before "designed.

"The said Charles Birnie represented that the said apprentice had "absconded and left the county shortly after the date of the last warrant, "which fact the said John Duthie admitted. The said apprentice farther "stated, that he had not returned to the service of the petitioner under "his indenture; and he farther stated, that he had acted by his father's "advice in so absconding. (Signed) JOHN DUTHIE, PAT. MASON, "*J. P.*

"Having considered the complaint and the above procedure, finds "the said John Duthie guilty of deserting, and of not returning to his

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'service under his indenture, in violation of the statute. Therefore "grants warrant to commit the said John Duthie to the tolbooth of "Montrose, therein to remain for one calendar month from this date, "reserving the complainer's claim for expenses and damages; and de- "cerns accordingly. Given under the hand and seal of the said Patrick "Mason, Esq., at Montrose, the 28th January 1839. (Signed) PAT. "MASON, *J. P.*

Duthie, having been incarcerated under this sentence, presented to the Court a bill of suspension and liberation, on the following grounds:—(1.) The original procedure under the petition was irregular; in respect—that the act 4th Geo. IV. c. 34, does not apply to apprentices in general, but merely to certain specified classes of apprentices, and no proof was offered that the suspender was an "apprentice within the meaning" of the acts referred to,—that the charge was not sufficiently specific as to the time and place of committing the offence,—and that there was no sufficient proof of the alleged desertion. (2.) The warrant of 8th November was limited to the period of one calendar month from its date; and by the expiry of that time, became incapable of being carried into execution. The procedure of the 28th January was for an offence different from that which had formed the subject of the previous petition and sentence; and therefore the Suspender was illegally brought before the Justice, and sentence pronounced upon him, without even the formality of a libel, or any of the requisites of common law or statute.

It was answered for the Respondent:—(1.) The original petition was, in all respects, regular, as it gave such a description of the nature of the Suspender's service as enabled the Justice to decide that he was an apprentice "within "the meaning" of the acts referred to. These acts apply to all apprentices whatever on whose binding out no larger a sum than L.25 was paid,[1] and therefore must in-

[1] The act 20th Geo. II. c. 19, refers to "any apprentice put out by "the parish, or any other apprentice upon whose binding out no larger "a sum than five pounds of lawful British money was paid." And the

clude the case of the Suspender, on whose binding out nothing was paid. This appears from his indenture, which was not produced in the inferior court, only because, according to the usual custom, it was in the hands of the master of the vessel, which was then at sea; but an extract of which, from the books of the Custom House, was offered to be produced, if necessary. In regard to the proof of desertion, it was afforded by the Suspender's own confession. (2.) The warrant, under which the Suspender was ultimately incarcerated, was a repetition of that formerly granted; and was, in the circumstances of the case, competent under the original petition. The new warrant was rendered necessary by the illegal act of the Suspender, in evading execution of the former warrant by absconding, and was competent, in the same way as a new term has often been granted for the execution of a pannel's sentence, where, in consequence of his own illegal act, it has not been carried into execution. (Hume, Vol. II. p. 474.)

The case came to be advised this day.

LORD MEADOWBANK.—I am for refusing the bill. It is important to observe that the Suspender's father was a party to his original indenture, and the negociation with him, after the granting of the first warrant, is not denied. The Respondent, in afterwards apprehending the boy, did it *suo periculo*. If he had apprehended a wrong boy, he

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act 6th Geo. III. c. 25, provides, "that nothing in this act contained "shall extend to any apprentice whose master shall have received, with "such apprentice, the sum of ten pounds." But the act 4th Geo. IV. c. 29, provides that "the provisions of the said recited acts," (20th Geo. II. c. 19, and 33d Geo. III. c. 55,) "so far as the same relate to "apprentices, shall extend, and be deemed and construed to extend, to "all apprentices upon whose binding out no larger a sum than twenty-"five pounds of lawful British money was or shall be paid, anything "contained in the said recited acts, or either of them, to the contrary "thereof in anywise notwithstanding."

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would have been liable in damages. But I think the Suspender was competently taken before the Justice the second time.

LORD COCKBURN.—I do not differ. But I cannot approve entirely of the proceedings adopted, which I think were rather irregular. The first warrant was certainly not exhausted. But, previous to the second warrant, a petition ought to have been presented, praying that the sentence should be carried into effect.

Susp. and Lib.

LORD MACKENZIE.—The second proceeding was substantially, though not in form, a re-committal. No new warrant was necessary before the Suspender could be brought before the Justice, because apprehension, in proper form, is not required to found jurisdiction.

The LORD JUSTICE-CLERK and LORD MONCREIFF concurred.

The Court accordingly refused the bill, with modified expenses.

R. CALVERT, W. S.—JAMES BURNESS, S.S.C. *Agents.*

JAMES GERROND, Suspender.—*Shand.*

AGAINST

JOHN GOOLD, Respondent.—*Robertson.*

SUSPENSION—STATUTE, 4TH GEO. IV. c. 34.—A suspension of a judgment, under the above statute, on the ground that the complaint contained vitiations and erasures, and that there was contained in the sentence an allocation of aliment not authorised by the statute, or concluded for in the complaint, refused.

No. 66. Gerrond v. Goold.

ON the 31st of January 1839, the Respondent, a frame smith in Dumfries, presented to the Justices of the Peace for Dumfries-shire a petition, setting forth that the Suspender had, on the 26th of January, agreed to work to him for a period of twelve months, conform to a written

Suspension.

No. 66. Gerrond v. Goold, May 20 1839.

Suspension.

contract therewith produced, that he had entered his service, and continued therein a few hours, when he deserted, and refused to return.

The petition prayed the Justices to take the petitioner's oath to the facts therein stated, to grant warrant for the Suspender's apprehension, "and, on the facts alleged be- "ing admitted or proved, to grant warrant for imprison- "ing him in the jail of Dumfries, to be kept to hard la- "bour, for a period not exceeding three calendar months, "all in terms of the act 4th Geo. IV. c. 34, § 3."

The Respondent's oath was accordingly taken, and the Suspender having been brought before one of the Justices, and emitted a declaration, the following judgment was pronounced:—"Dumfries, 1st February 1839. Having "again considered the petition, complainer's oath, and de- "claration emitted by the defender, and whole proceed- "ings therein, sentences and adjudges the said James Ger- "rond to be imprisoned in the jail of Dumfries, for the "space of two calendar months, there to be kept to hard "labour, and grants warrant to officers of court, and their "assistants, to apprehend and incarcerate him in said jail, "and the magistrates of Dumfries and the jailor are "hereby required to receive and detain him accordingly, "and allocates an aliment of four pence *per diem* to the "defender. (Signed) Jos. Beck, *J.P.*"

Gerrond, having been incarcerated under this sentence, appealed to the Quarter Sessions, and was liberated on caution. He afterwards abandoned his appeal, and presented a bill of suspension, on the following among other grounds: (1.) The petition was originally presented, and the oath appended to it written out, in the name of *James* Goold, which was altered to *John* after both were signed; (2.) It contained deletions and erasures, of which no notice is taken at the end of the petition; (3.) The allocation of aliment, (besides being insufficient for the Suspender's maintenance), was unauthorised by the statute, and inconsistent with the prayer of the petition.

No. 66. Gerrond v. Goold, May 20 1839.

Suspension.

The Court repelled the two first reasons of suspension, their Lordships observing, that complaints under this and similar statutes, have repeatedly been decided not to be regular legal instruments. As to the remaining reason some doubt existed, and judgment was delayed, till information should be procured as to the practice of alimenting prisoners under such statutes.

At a subsequent diet of Court, (July 3d), it was admitted that the aliment allocated to the Suspender was the usual jail allowance at Dumfries. The Court accordingly refused the bill, with expenses.

DAVID MITCHELL, S.S.C.—THOMAS RANKEN, S.S.C. *Agents.*

June 10 1839.

Present,

THE LORD JUSTICE-CLERK.

LORDS MEADOWBANK, COCKBURN.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Ivory—Innes.*

AGAINST

WILLIAM CARLYLE—*J. T. Gordon.*

RAPE—OBJECTION OF TOO GREAT LATITUDE IN STATING THE TIME OF THE OFFENCE.—In a charge of rape, or assault with intent to ravish, a latitude of three months allowed to be taken in stating the time of the offence,—the female assaulted being under the years of puberty.

William Carlyle.

WILLIAM CARLYLE was charged, alternatively, with Rape, or Assault aggravated by having been committed with intent to Ravish, and further aggravated by having been committed upon a girl under the years of puberty:—

"IN SO FAR AS, on one or other of the days in the month of January "1839, or on one or other of the days of December immediately pre-

"ceding, or of February immediately following, the particular day be- "ing to the prosecutor unknown, within the house at Needless, in the "parish of Atholstaneford, and county of Haddington, occupied by "him, the said William Carlyle did wickedly and feloniously attack and "assault Mary Reid, &c. a girl then under twelve years of age," &c.

No. 67. William Carlyle, June 10 1839.

Rape.

J. T. GORDON, for the pannel, objected to the relevancy of the Indictment, on the ground that there was no sufficient specification of the time when the offence was committed. The crime charged did not admit of any tract of time, was effected by one continuous undivided act of violence, and was to be proved by the direct testimony of the party injured. It is impossible to conceive that a woman, not alleged to be reduced to a state of insensibility, should forget the time when the violation of her person was committed, which must have been stated to the Public Prosecutor immediately after the commission of the act. If a defence of *alibi* were put in in this case, the Public Prosecutor would be forced to restrict himself to a particular time. But he could not do so without admitting the irrelevancy of his libel, for he would thus admit the possession of information, which he ought to have set forth on the face of his Indictment, and not withheld from the pannel.

INNES, for the prosecution, answered,—If it is competent to take the objection at all, this is not the proper time for doing so. In the course of the proof, it would be shown that the specific day was unknown to the Prosecutor, but it would be impossible for him, in every case, to go into the reason of his not knowing the precise time. The latitude allowed is not confined to any particular offence, because it is impossible to depend implicitly on the evidence of any witness. (Hume, II. pp. 221, 224.) The pannel can suffer no injury, as he has not stated any defence of *alibi*.

LORD MEADOWBANK.—The public prosecutor states positively that he does not know the specific time.

LORD COCKBURN.—It is also important that the individual, upon whom the offence was committed, is stated

No. 67. William Carlyle, June 10 1839.

Rape.

to have been under the age of puberty. I have been in a trial where the child was only four years old. In such a case, it might very probably be impossible to state the time precisely.

The Court repelled the objection, and sustained the relevancy of the Indictment.

The pannel pleaded not guilty, but in the course of the trial retracted his plea, and pleaded guilty to the charge of assault as libelled.

In respect of which judicial confession, and the evidence led, the Jury found the pannel guilty of the assault as libelled; and he was sentenced to be transported beyond seas, for the period of fourteen years.

July 3 1839.

Present,

THE LORD JUSTICE-GENERAL.

THE LORD JUSTICE-CLERK.

LORDS MEADOWBANK, MACKENZIE, MEDWYN, MONCREIFF, COCKBURN.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Ivory—Innes.*

AGAINST

GEORGE BROWN.—*Broun.*

THEFT.—The appropriation, by a watchmaker, of a watch left with him to be cleaned or repaired, is Theft.

No. 68. George Brown.

Theft.

GEORGE BROWN and HELEN JOHNSTON or SMITH, were brought before the Circuit Court of Justiciary at Perth, charged—the latter with Theft, and the former alternatively with Theft or Breach of Trust.

IN SO FAR AS, "the said George Brown having been a watchmaker

No. 68. George Brown, July 3 1839.

Theft.

" at Newtyle, in the parish of Newtyle and county of Forfar, and having " been employed in that character to clean and repair watches for several " of the lieges," and nine different individuals having, at various specified dates between the month of August and the end of December 1838, " within the house or shop occupied by the said George Brown," delivered to him certain watches, " in order that they might be cleaned or " repaired, and re-delivered" to their respective owners, " the said " George Brown and Helen Johnston or Smith, did, both and each, or " one or other of them, on the 7th of January 1839, within the house " in Newtyle, occupied by the said George Brown, wickedly and " feloniously steal, and theftuously away take, the several watches " above libelled, &c.:" OR OTHERWISE, time and place last above libelled, the said " George Brown did wickedly and feloniously, and in " breach of the trust reposed in him, abscond from Newtyle, and did " carry the foresaid watches away with him, and did not return the said " watches, or any of them, but did appropriate the whole, or part of the " said watches, to his own uses and purposes, and did defraud the " owners of them."

It was objected for the pannel Brown, that the *species facti* libelled did not amount, as against him, to the crime of theft, but merely to breach of trust. Lords Moncreiff and Cockburn certified the case to the High Court. On the 27th of May 1839, Informations were ordered on the relevancy of the charge of theft against the pannel Brown.

In the Information for the prosecution, it was argued: The distinction between theft and breach of trust was hardly raised in the time of Mackenzie; but his opinion is worthy of some attention, because he ventured to throw aside the now untenable principle, that the quality of the offence depends upon the title of the first acquisition of the goods;—" And albeit," he says, " it be a rule in " the civil law, that *initium unius cujusque actionis* " *semper est attendendum*, yet the former reason (viz. be- " cause the intromission and possession there flowed ori- " ginally from the master) is not valued, because, when a " master gives money to his own servant, if he employ it " to any other use than is appointed by his master, as if " he should drink that which was given him to pay his " master's merchands, or if he should sell his master's

No. 68. George Brown, July 3 1839.

Theft.

" horse, with which he was sent to a friend, these misem-
" ployments would certainly infer punishment, though the
" possession flowed originally from the master. And I
" think that theft, in the case of a misemployed lend, and
" the other cases above expressed, is more heinous than
" ordinary thefts, seeing it is aggraged by the breach of
" trust, or friendship; and it likewise can be less guard-
" ed against. For which two reasons, domestic theft
" is still more heinously punished than ordinary theft."
Without relying too much on the authority of a writer, who did not foresee the numerous delicate distinctions which have been forced upon us by the more complicated relations of increasing civilization, it may be fairly maintained that the authority of Mackenzie is not against the principle contended for, while his abandoning the doctrine that the offence received its character from the nature of the first intromission with the goods appropriated, ought to have warned later writers against rashly adopting that, as the ready solution of the difficulties which beset this question.

In venturing to examine most respectfully the grounds upon which Baron Hume has arrived at some conclusions favourable to the pannel's objection in the present case, it may be observed that the chapter which treats of this subject, as it is one of the most difficult, is also the least satisfactory part of that author's work. This undoubtedly arose from unsettled and clashing decisions of our courts, in a very great degree: but it cannot be concealed that it was also partly caused by an adoption and somewhat too literal an adherence to the civil law definition of the crime of theft. After adopting the definition—*contrectatio fraudulosa rei alienae, lucri faciendi causa*;—Baron Hume says, (Vol. I. p. 57)
" The fundamental circumstance here (for all the others
" serve to qualify it only) is this of the *taking*, or,
" as our lawyers, after the stile of the civil law, have
" sometimes termed it, the contrectation of the thing. In
" which it is implied that the thing has not been pre-

"viously in the possession of the thief, but in that of "the owner, or some person for him, out of which the "thief, without the consent of the owner, removes it." The learned author, indeed, subjects this principle to considerable modifications; but it still recurs to him, from time to time, through the whole discussion of the subject; and it will be found, that upon this mistaken notion,—that appropriation of a thing is theft or not, according as the first handling was fraudulent or otherwise, —are to be accounted for all the classes of cases under this head, in which this writer may now be said to have been erroneous, since he is at variance with the deliberate and solemn decisions of the Court. For example, when he lays it down that the appropriation of a watch given in loan, or a horse lent for hire, or a pack of goods sent by a carrier, does not amount to theft, he says, (p. 58) "the reason is "obvious, that there has been no felonious *taking* out of "the owner's possession." It has been decided *in terminis*, that the last two of these instances are thefts. In like manner, where he lays down (p. 62) that in the case of a passenger finding a pocket-book with the owner's name marked in it, or a hackney coachman finding a parcel left in his coach by a passenger, or a landholder finding a stray animal in his field, or wrecked goods on his shore —it is not theft to appropriate these articles, he assigns as the reason, "because there is no felonious intention, "nor even a trespass in the first occupying of the thing." It has been decided that at least the first of these instances amounts to theft; and it seems to follow *a fortiori* of the others.

It is remarkable in how many of the cases thus attempted to be brought within his general principle, the decisions of the Court have run counter to the opinions of this learned author; but it is still more extraordinary that he should not have seen fit to restrict it exceedingly, if not altogether to abandon it, when he himself is driven to state the law applicable to a series of cases equally at variance with his first general principle, and with those

No. 68. George Brown, July 3 1830.

Theft.

illustrations of it, some of which are mentioned above. When he states (p. 64) that it is theft for the butler to steal his master's plate, or the groom to steal his horses, or the shepherd the sheep which have been committed to his keeping, or a porter, or clerk, goods or money he has been employed to deliver,—it is plain that in each of these instances *the thing was previously in the possession of the thief*; it is plain *that there has been no felonious taking out of the owner's possession*; there was clearly *no felonious intention in the first occupying of the thing*; and yet all these are attempted to be brought under the same unbending canon which he imagined had satisfactorily ruled the former classes. He is obliged accordingly to raise a new distinction, which goes far to break down his general rule. He says, that in none of these later instances has the servant any sort of title or interest in the thing; and he is content to adopt a figurative, instead of an actual, *taking*, from the possession of the master.

In another place, (p. 68) Baron Hume seems to make the distinction depend upon the goods having been obtained upon some "habile title for the conveyance of "*property*, but on a lower and a limited title;" but it is manifest that this is altogether irreconcileable with the first principle announced by him as his guide; and he himself has apparently been aware of some of this inconsistency, since he concludes with the remark, that our "practice has not yet attained to sufficient maturity "in these matters; and that a great part of what has "been delivered is less to be considered as the result of "our adjudged cases, which are few in number, than as "an exposition of opinions which seem to be reasonable "in themselves, and are in some particulars recommended "by the practice of England."

It will not be necessary to examine Mr. Alison's discussion on this subject at much length. He adopts the principle, (Vol. I. p. 354,) that "the distinction between theft and "breach of trust is to be found chiefly in the terms or way

"in which the thing taken, originally came into the cri- "minal's possession;" and although he qualifies it by various excellent limitations, he cannot avoid the inconsistencies and contradictions which necessarily flow from a faulty principle, and one at variance with the series of precedents of the Supreme Court. For example, he lays it down as a rule, that "where the article is obtained "upon a fair contract, not for a mere temporary purpose," the subsequent appropriation is not theft, but breach of trust. Now, by any fair interpretation of this rule, it must be held, that if the article is transferred for a temporary purpose only, the appropriation should be considered as theft. But the author says, in a subsequent section, (p. 359,) that if goods are put into a tradesman's hands to be repaired by a tedious operation, the appropriation is still only breach of trust. In like manner, this last rule may be well contrasted with the preceding rule of the same author, (p. 252.) "If goods are delivered to a stran- "ger or carrier for a special and particular purpose, inde- "pendent of any transfer of property, as to be conveyed to "a particular place, or *subjected to a particular operation*, "the abstraction of them by the person entrusted is theft." So completely, indeed, does the canon, adopted without sufficient consideration by this author, fail him in his adaptation of it to later practice, that while at one place, (p. 360,) he quotes a series of precedents for prosecuting as breach of trust, the appropriation by a watchmaker of the watches sent by his customers to be repaired,—the *species facti* of the present Indictment,—he asserts at another, (p. 263,) with as little hesitation, that "wherever "the delivery of the goods is for a special and specific "purpose, the possession is held to reside with the pro- "prietor; and if the possessor abstract, he commits theft. "Thus it is theft to abstract plate set before a person in "a tavern, *or if a watchmaker appropriate a watch de- "livered to him to clean*,—or a washer-woman carry off "clothes delivered to her to wash,—or any one plunder

No. 68. George Brown, July 3, 1839.

Theft.

"goods delivered to him for custody in a locked chest with "the key."

It is not easy to decide from whence the rule was borrowed, which has led our Institutional Writers on the Criminal Law into such singular inconsistencies. It cannot be traced to the Roman law, except in so far as the brocard quoted by Mackenzie, *initium unius cujusque actionis semper est attendendum*, applies to this as it does to every legal question. A too literal interpretation of the definition of the Civilians, "*Furtum est contrecta-*"*tio rei fraudulosa lucri faciendi gratia*," may more probably have given rise to it. It is certain that the Civilians themselves did not use *contrectatio* in the narrow sense of *the first handling* of a thing, as will be seen in some of the examples to be quoted hereafter. But wherever the mistake may have originated, a consideration of the whole train of decisions on the subject establishes beyond doubt, that the distinction between theft and breach of trust in the law of Scotland does in no way depend upon the fraud or the honesty of the first acquiring of the goods. Many cases have occurred in which a holder, whose possession was fraudulent from the beginning, has been found guilty only of *breach of trust*, for appropriating the property in his hands; and it is matter of every day practice, for the Court to direct convictions of *theft*, in cases where the felonious appropriator was admitted to be innocent in the first handling of the thing.

From a comparison of all the adjudged cases of modern date, and, indeed, as far back as the attention of the Court has been demanded to this nice distinction, one pervading principle appears to have regulated its decisions. Where a person holding property is the mere hand for detaining or transmitting it—where there is no permanent mandate —no right of administration—and the holder is bound to give over the property *in forma specifica*;—the appropriation by that holder is theft. Where, on the other hand, the holder has a right of management,—a power to exchange—where he is only bound to account for the pro-

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perty itself, or an equivalent,—the appropriation falls under the *nomen juris* of breach of trust.

A small number of cases recently decided, and most of them fully argued and deliberately considered, have been sufficient to settle these rules beyond the possibility of challenge.

The first of these cases is that of *Mackay*, December 1826, (Syme, p. 54.) in which a porter, who had absconded with luggage, which he was employed to carry, was indicted for theft; and the objection having been stated, that the *species facti* amounted at most to emblezzment, the Court held that the indictment was rightly laid, and rested that judgment on the reason, that 'the mandate 'given was the most temporary of all.'

The next decision on this subject, that of *Mitchell*, May 1829, (Shaw, p. 220,) settled that a person employed to convey goods in his cart, who opened a bundle of the goods, and appropriated a part of them, was guilty of theft.

In the case of *Tait and Murray*, November 1829, (Shaw, p. 225,) the indictment charged the pannel Murray, a clerk who had received certain sums of money from his employers, with special instructions to carry them to the bank, with appropriating the same; which was libelled as theft. It was objected to the relevancy, that there was no felonious taking out of the possession of the owner, either actual or constructive, but only an appropriation, after lawfully and honestly obtaining possession with the consent of the owner. But the case having been certified, that objection was repelled.

The case which received the fullest discussion, and was most deliberately considered, is the case of *M'Intosh*, certified from Glasgow, and solemnly decided in the High Court, in February 1835, (13 Shaw and Dunlop, p. 1168.) There the pannel was a porter, in the employment of a Steam Boat Company, and had appropriated various distinct sums of money, which he had been employed to deliver to certain parties. The indictment charged theft, or breach of trust, alternatively. It was objected that the

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species facti did not amount to theft. The case was certified upon that objection; and the Court unanimously found the charge of theft relevant.

It was completely in accordance with this decision, that the Court held that the indictment was rightly laid as theft, in the case of *David Field*, January 1838, (2 Swinton, p. 24,) where the facts set forth in the indictment were, that he being a clerk to a shopkeeper, and his master having intrusted and delivered to him L.2. 10s. sterling, with instructions to pay the same to the collector of excise for a wine license, he appropriated the same to his own uses and purposes.

Not less in accordance with the principle solemnly fixed in *M'Intosh's* case, was the decision in the case of *Climie*, May 1838, (2 Swinton, p. 118,) where the appropriation of money by a messenger, was found not to be a relevant charge of theft, principally on the ground that it was not set forth that the money was to be delivered by him *in forma specifica*.

The latest case which has occurred, involving the distinction between theft and breach of trust, is that of *Michie*, January 1839, (2 Swinton, p. 319), where a boy, in the employment of a bookseller, who appropriated a bank note which he had received from his master to get changed, was found guilty of theft.

While these decisions may be considered on the one hand, to have overturned the rule stated by both Hume and Alison, and while they certainly have fixed a practice contrary to the opinions of those writers in particular classes of cases, where the distinction of theft and breach of trust was the turning point of the decision, it is remarkable how fully they are supported by the great authority of the Roman Law. It may be stated shortly and generally, as the received doctrine among the Civilians, that if goods, received for a limited and special purpose, be appropriated,—that appropriation amounts to the crime of theft.—*Furtum autem fit, non solum cum quis intercipiendi causa rem alienam amovet; sed generaliter cum quis alienam rem invito*

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domino contrectat. Itaque sive creditor pignore, sive is apud quem res deposita est, ea re utatur ; sive is qui rem utendam accepit, in alium usum eam transferat quam cujus gratia ei data est,—furtum committit.—I. iv. t. 1. § 6. Thus a person borrowing a thing is held guilty of theft, if he afterwards convert it to his own use ; *Dig. L.* 47. *t.* 2. § 71. If a person receive property in pledge for a debt, the appropriation of that is theft; *Ibid.* §§ 54. 73. A man hiring a horse and riding off with it is guilty of theft ; *Ibid.* § 40. In like manner, a tradesman receiving goods to be cleaned or mended, 'Fullo et sarcinator, qui 'polienda vel sarcienda vestimenta accepit, si forte his 'utatur, ex contrectatione eorum furtum fecisse videtur ; 'quia non in eam causam ab eo videntur accepta ; *Ibid.* '§ 82.'

It appears that before this branch of law had received the full consideration which has latterly been bestowed upon it, the *species facti* of the present indictment having occurred, was prosecuted under the head of breach of trust ; and a precedent having thus been established, that practice has been adopted in several recent cases in the same circumstances ; and on this is raised an argument, certainly of considerable weight, that the law is settled as to this particular case, and that to hold otherwise would infer that all the convictions for this offence libelled as breach of trust were wrong.

But, (1.) If it has been shewn that these decisions and convictions were really at variance with the principle established by the whole tenor of the later and more deliberate judgments of the court, they would, on that account, be unfit to quote as precedents ; and no reason is sufficient for continuing a practice which has been found to be erroneous. (2.) Although the Court have in several instances sanctioned the practice of indicting this *species facti* as breach of trust, it does not necessarily follow that the same circumstances might not be relevantly charged as theft. There are some crimes, indeed, which, though frequently approaching, are in their nature so distinct,

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that it would be manifestly incompetent to charge the facts under the lesser denomination, when they really amount to the other,—as for example theft and robbery, which, although frequently running near in circumstances, are yet so distinct in character, that the proof of a violent taking away would secure an acquittal under an indictment for theft. It is otherwise, however, with regard to many crimes, as for instance assault and robbery, assault and rape, culpable homicide and murder,—in all of which a conviction can competently be taken for the lesser offence, although it may turn out in proof that the circumstances would have sustained an indictment for the higher.

This is perhaps more clear as between theft and breach of trust than in any of these cases just mentioned. It has been settled beyond all question that theft can be relevantly charged, although the goods came into the hands of the accused originally under some contract of *trust*. The servant *entrusted* with his master's plate,—the clerk *entrusted* with his master's money for a specific purpose,—the person *entrusted* with a horse to ride a journey,—each of these is relevantly indicted for *theft*, while undoubtedly the commencement of his possession was one of trust, and the act of appropriation, whilst properly found theft, is nevertheless a manifest *breach of trust*. Nay, farther, it is not unusual to support as an aggravation in a charge of theft, that the crime was committed by a servant or clerk employed, that is *entrusted*, by the person from whom the goods were stolen.

This doctrine seems to be sanctioned by the authority of the civil law. As in the famous case stated in the Institutes, where the puzzle arose upon a different point, it is assumed as clear law that, if a person corrupt another's slave into stealing from his master, the seducer may either be prosecuted for theft, or be liable to the *actio servi corrupti*, (*I. iv. t.* 1. § 8), so also, "Si is cui commodata 'res erat, furtum ipsius admisit, agi cum eo et furti et 'commodati potest. Et si furti actum est, commodati 'actio extinguitur. Si commodati, actioni furti exceptio

'objicitur.'—*Dig. L. 47. t. 2. § 71*; although the practice of the Roman law, where the prosecution for theft was not necessarily *in vindictam publicam*, renders it perhaps unsafe for us to found much upon this authority.

It is submitted that no solid distinction exists between the present case and those quoted above, where convictions followed, under the direction of the Court, on charges of theft. In no one of the charges in the present Indictment could there have been any transfer of property. None of the parties intended to part with their watches permanently, when they sent them to be cleaned or repaired. The pannel had no right of administration; he was not entitled to exchange or materially to alter the watches of his customers. He was bound to restore each *in forma specifica*, much more strictly than the clerk sent to deposit money or to pay an account, who could scarcely be punished for substituting other money for that of his employers. The watches were committed to his charge for a temporary purpose, to undergo a certain definite operation. He was in no respect the *dominus* of the property. The property remained still with the original owners, and his appropriation of it was therefore theft.

In regard to the English cases and authorities cited on behalf of the pannel, if the law of England were firmly established in the way stated for the pannel, it would seem to rest on rather shadowy distinctions: and principles may well be questioned which lead to the amusing result, that the abstraction of *a part* is a heavier offence than the carrying off the *whole*. But while some of the cases cited do not support the pannel's argument at all, and others carry it too high; it will be found that the later practice of the English courts has approached to the same rational rule, which a series of cases has fixed in Scotland.

The authority of Hawkins, the first founded on by the pannel, is to be received with hesitation on this subject in a Scotch court, when we find him lay down broadly (B. I. ch. 33, § 1,) that, "if the party be guilty of no trespass

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'in *taking* the goods, he cannot be guilty of felony in 'carrying them away:' and on this ground decide that the appropriation of goods *found* is not theft; while, in an after passage (Ib. § 4,) he rules that 'even those 'who have the possession of goods, by the delivery of the 'party, may be guilty of a felony, by taking away *part* 'thereof, with an intent to steal,' while the appropriation of the *whole* is not felony.

The principle announced by East, (Vol. II. p. 632,) and deduced from his survey of the whole practice of England, is, 'that where, notwithstanding a delivery by the owner 'in fact, the legal possession remains exclusively in him, 'larceny may be committed, exactly the same as if no such 'delivery had been made.' Now, in the present case, it cannot be seriously doubted, that notwithstanding the delivery of the watches for the purpose of repairing, the legal possession really remained in the owner. He was entitled to have them whenever he chose, whether repaired or not: and if lost or stolen, without fault in the watchmaker, the loss undoubtedly fell upon the owner.

The case of *Levy*, (4 Car. & Payne, 241,) which is quoted for the pannel, turned upon a mere specialty. A watch was given to the prisoner to be repaired. 'A week 'after, the prosecutor asked the prisoner for the watch, 'when the latter said it was not ready; and when the 'prosecutor saw him again, he said he had sold it. To 'this the prosecutor replied, "*I will have my watch or* "*the money.*' The prisoner said, '*I will give you either* "*the watch or money to-morrow.*" Many of the elements of theft were here wanting. There was no concealment of the appropriation; there was no proof of fraud; there was acquiescence amounting almost to authorising the sale.

The last English case involving a discussion on this point that has occurred, afforded an opportunity of solemnly deciding, whatever the ancient writers might have laid down, that by the existing law of England, the question

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whether an act amounts to theft, does not depend upon the honesty or dishonesty of the first taking.

M'Namee was convicted before Mr. J. Gaselee, of stealing 118 sheep, the property of Benjamin Sowerby; but a question having arisen whether, in point of law, he could be considered guilty of felony, *unless at the time he received the sheep from the prosecutor to bring to London, he intended to steal them*, the Jury found that the prisoner did not intend to steal the sheep at the time he took them into his possession. In Michaelmas Term, 1832, all the Judges (except three) met, and having considered this case, were unanimously of opinion that, as the owner parted with the custody only, not with the possession, the prisoner's possession was the owner's, and that the conviction was therefore right, (*Bernard M'Namee*, 1 Moody, p. 368.)

In the Information for the pannel, it was argued: The Indictment is in many respects peculiar, and, it is thought, irregular. While it sets forth that the pannel, Brown, "having been a watchmaker," and "having been "employed in that character to clean and repair watches "for several of the lieges," had received delivery of certain watches, it concludes, that, "you the said George "Brown *and Helen Johnston or Smith* did, both and "each, or one or other of you, wickedly and feloniously "steal, and theftuously away take," &c. There is no *species facti* applicable to the female; but upon the narrative that Brown had obtained the watches in his capacity of watch-maker, without any explanation of the manner in which his fellow-prisoner is held to have been implicated in the transaction, and without her name once occurring in the nine charges which the Indictment contains, it is *per saltum* inferred that she was a *socia criminis*. The alternative charge of breach of trust applies to Brown alone; and it is left to conjecture to determine how he could be guilty of embezzling the identical watches, which Johnston at the same time and place is said to have stolen. Apparently the only way in which this inconsist-

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ency can be overcome, if the offence of the male pannel shall be held to be simply breach of trust, is, by the abandonment of the charge of theft against the other prisoner; but, on the other hand, if it shall be held that the more serious crime has been properly charged against Brown, a strong objection in favour of Johnston will then occur, in terms of the decision in the case of Tait, (Nov. 30, 1829, Shaw, p. 225), that the *species facti* set forth does not amount, as against her, to a relevant charge.

It is material to observe that the present is not one of those cases justly held to be theft, where a common impostor falsely represents himself as being of a particular trade, and in that pretended character gets possession of a subject, which he immediately appropriates. It is admitted that the watches in question came into the hands of the pannel in the course of his ordinary occupation. As an additional circumstance in his favour, it is admitted that the watches remained with him, during a considerable interval, unappropriated. Thus, then, stands the charge of theft against him: That being a watch-maker by trade, certain watches were brought to him, and left at his usual place of business, to be cleaned or repaired, under an implied obligation that, as soon as the necessary repairs were completed, the owners should, on paying the expense incurred, have a right to demand re-delivery; that the pannel did not immediately appropriate the watches, but that he continued to possess them lawfully for some time, according to agreement. He is then charged with having stolen the said property, but in what way he did so is not condescended upon, although it seems almost essential, in a case where the accused party was in the legal possession of the subject, that he should have been fully informed of the manner in which his *felonious* possession is alleged to have begun,—whether by refusing to restore the subject when required,—by selling it and pocketing the proceeds,—or in whatsoever mode was consistent with fact.

The proposition upon which the pannel is willing to

rest his defence against the charge of theft, is, that '*the* '*appropriating, by a person possessing under a regular* '*contract, a subject delivered to him by the owner, in* '*consequence of that contract, is merely breach of* '*trust.*'

(1.) Since the civil law did not acknowledge breach of trust as a separate and distinct crime, its provisions can be of no authority upon the present question; and, therefore, the pannel, without reluctance, admits that, among the Romans, his offence would be reckoned as theft.

In the Scotch law, the distinction between theft and breach of trust was adopted at an early period. The principle, upon which it proceeds, is clearly stated in the '*Regiam Majestatem*,' a work which, according to Sir George Mackenzie, 'is looked upon as authentic *in cri*-'*minalibus*,' forming one branch of our criminal law. It is there said respecting a person, who appropriates a thing which he has received in loan, 'a furto omnimodo 'excusatur per hoc *quod initium suæ detentionis habuit* '*per dominum* hujus rei;' (Reg. Maj. iii. 9, 5,) and it is worthy of remark, that the loan referred to is not *mutuum*, in which the property passed to the borrower, but *com-modatum* or loan for use,—a contract, under which, specific re-delivery of the subject lent was required. Sir George Mackenzie, (Crim. i. 19, sect. 2,) rejecting the civil law, declares our law upon this point to be in conformity with the Regiam Majestatem: 'Albeit, by 'the civil law, the keeping of a thing lent longer than 'the time allowed, or the employing it for another use 'than that for which it was first lent, be theft, yet in 'our law it is not (*Reg. Maj.* iii. 9, 5.), and the reason 'there given is, *because the intromission and possession* '*there flowed originally from the master.*' It is true, that this eminent writer doubts the correctness of the law which he states, and appears disposed to consider the offence as an aggravated theft, 'seeing it is *aggreged by* '*breach of trust* or friendship, and it can likewise be less 'guarded against;' but he never hints that his individ-

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ual opinion had received the sanction of judicial authority; and, on the contrary, he not only admits the law to be as he had declared it, but even considers it as more equitable than the Civil Law to which it is opposed. Forbes, in his Criminal Institutes, (ii. p. 148,) says, "Our law makes not a borrower or hirer of a thing guilty "of theft by applying it to another, or farther use, than "that to which it was lent, *if he had no sinister design* "*so to misapply it at the time of the hiring or borrowing.* "But if a man borrow a thing for a certain use, with a "design to apply it at the time to some other use, "as where one borrowing things upon some plausible pre- "tence designs to break, and run his country with them, "he is guilty of theft. Because in such a case, the lender "is as much wronged by deceit as if the goods had been "stolen from him; and the first intention of the borrower "was not to have the simple use of them, but only under "colour thereof to have the better opportunity of packing "away with them."

Burnett, (p. 111), founding upon "our old law," is not less explicit. "*A theftuous abstraction*," (he says) "seems "to imply, that the thing is *ab initio* taken *clam et frau-* "*dulenter* out of the custody of him in whose possession it "is. Hence it is, that the appropriation of goods that "have been delivered on credit, or impledged, of goods "given in loan or for hire, *or delivered out of the possesion* "*of the owner* into the custody and for the use of another, "is not held to be theft."

Mr. Hume says, (Vol. i. p. 57,) "The fundamental cir- "cumstance here (for all the others serve to qualify it on- "ly) is this of the *taking*, or, as our lawyers, after the style "of the Civil Law, have sometimes termed it, the contrec- "tation of the thing; in which it is implied, that the thing "*has not been previously in the possession of the thief*, but "in that of the owner, or some person for him, out of "which the thief, without the consent of the owner, re- "moves it. Now with this airticle, simple as it first ap- "pears to be, there opens a wide field of discussion; as

"upon the due understanding of this matter depends, in "some measure, the distinction between theft, and those "other criminal, but as the law deems them, lower of- "fences of fraud, swindling, and breach of trust, "which are nearly allied to theft, and very liable to be "confounded with it. And here, without pretending to "furnish an invariable criterion, or to resolve all those "nice debates, which have exercised the ingenuity of the "ablest lawyers, I shall content myself with stating, on "the one and the other part, certain *descriptions of cases*, "which are *clearly referable to different denominations of* "*crime*." Having first described swindling to consist in the offender getting a transfer of the *property* upon credit under false pretences, he then distinguishes between theft and breach of trust. "Put the case, that the owner does "deliver the thing, but *on some lower title than that of pro-* "*perty*,—as in the case of a watch given in loan, or a horse "let to hire, or a pack of goods sent by a carrier to be de- "livered at a certain place; still the after conversion of this "thing to the possessor's own use, by selling the watch "or horse, or opening the pack and taking the contents, "though it is a wrong, and even a criminal act, does not, "however, amount to the crime of theft. The reason is "obvious, that there has been no felonious *taking* out of "the owner's possession. The man in all these instances "*had at first obtained the thing honestly, by a fair con-* "*tract, in the ordinary course of business, and meaning,* "*as at that time, to restore or deliver it in terms of his* "*agreement*. At the instant, therefore, of the delivery "made him in pursuance of that contract, the owner's pos- "session ceased. The receiver was thenceforward in the "lawful possession; and when he converts the thing to his "own use, in pursuance of a purpose which is only taken "up afterwards, and is probably suggested by his com- "mand of the thing, *he only breaks his contract*, and "abuses his powers as possessor. . . . The same "principle which protects the trespasser in the case of "delivery, for some limited and temporary use, still more

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" strongly applies in his favour, in proportion as he has the " thing upon a higher interest of his own, and under a con- " tract which vests him with a fuller management and com- " mand of it."

Mr. Alison reiterates the same opinions in nearly the same terms. Under the head of breach of trust, he lays down the rule, that " *wherever the article is obtained upon* " *a fair contract*," then " the subsequent appropriation is to " be considered as an act of breach of trust."

(2.) Upon an attentive review of all the cases, in which the point of relevancy has been raised, it will appear that the Court, instead of rejecting the rule above mentioned, have invariably admitted and acted upon it; and that the unsuccessful attempts, which were made by different pannels, to bring their offence under the denomination of breach of trust, arose, not from any doubts, which the Judges entertained, with regard to the true nature of that crime, but because they considered the special circumstances libelled to fall clearly under a different category.

There is one class of cases which are so obviously thefts, that no argument can be drawn from them on either side, viz. where a person, without having any sort of custody over the subject, takes an undue advantage of his accidental proximity to it; as, for example, a servant, who, in his ordinary routine of duty, gets his master's coat to brush, and abstracts the purse, which has been, undesignedly, left in the pocket. This, as a proper domestic theft, is regarded as an aggravated act, and can never constitute breach of trust, since the owner of the purse had no intention of parting with the possession of it. But carry the case one step further, and suppose that the servant abstracts the coat itself, his crime is nevertheless theft, for the law holds, that the delivery of the subject is so qualified, that the master's possession has not ceased. Upon this principle, it has been decided that the butler, who takes the silver plate, or the shepherd, who appropriates the sheep, belonging to his master, is guilty of theft. These, like other servants, have, in fact, no previous possession

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of the thing appropriated; and, although the one may have daily access to the plate, and the other to the sheep, it is so given to them as to leave untouched the control which the owner has over his property. The legal possession of the subject still continues with the master. The plate stands in his press, or on his sideboard, and the sheep are in his fold; in short, the servant has nothing but a bare custody, and that of the most general kind; he is vested with no legal right to the subject, but is merely allowed *access to the possession of his master*. If the thing should perish, the loss would fall upon the owner; if it were stolen by a third party, it would be libelled as being in the possession of the owner, not of his servant, who could not insist for its recovery; and if a creditor of the master should arrest it in the servant's hands, the arrestment would be inept. To all such cases the legal maxim applies, *quod facit per alium facit per se*; and the master, instead of ceasing, *continues* to possess through his servant. These views are fully confirmed by the remarkable case of *Margaret Hertsyde*, (1608. Pitcairn's Crim. Trials, vol. ii. p. 544,) who was tried, ostensibly, for stealing jewels belonging to the Queen, upon whom she was an attendant, though, according to Sir James Balfour, "the Courtiers "talked that it was for the reveilling some of the Queen's "secrets to the King, wich a wysse chalmbermaide wold not "have done." Here the defence was ingeniously pleaded, that "the summondis was nawayis relevant "aganis the "said Margaret, being ane woman of credeit (trust) as "is confest;" that "the *saidis jowellis and perles cam* "*fra the begynning lauchfullie to the defenderis posses-*"*sioune*, and sua scho could neuir commit theft be dispos-"ing thairupon." To which it was answered by my Lord Advocate, "The pannell *had nevir lauchfull possessioun of* "*the guidis lybellit*, seing the possessioun of the servand "of the maisteris guidis to the maisteris vse, is the maisteris "possessioun." The court found the libel relevant; but the jury having acquitted of the theft, and merely found that the pannel *abstracted and detened* the jowellis; she

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notwithstanding, by an exercise of the royal prerogative, not uncommon in those times, received sentence as a thief. In the precept which he addressed to the Court, his Majesty declares that, " seeing thair can be na difference " between the unlauchfull medling with any thing belonging to the Quene, our dairest bed-fellow, hir person and " our awin, and lykwayis that ye exampill is maist pernitious, *and all uterlie intollerable that any face or cullour* " *sould be pute* upon ye coosening or abstracting from " either of us any pairt of our jowillis or moveabillis, *by* " *such as are in trust or haif ye keeping* of thame. We " most conclude that scha hes delt sa dishonestlie herein, " as we accompt hir als worthie to be repute and declaired " Infamous (lykas it is our plesour that ze declair hir " to be so) *as gif scho had been directlie convict of Theft.*" In another case of a servant, which occurred sixty years later, the libel of theft was held *irrelevant*, inasmuch as the articles stolen consisted of wearing apparel, used by the pannel himself, though his master's property. Sir George Lockhart pled, that " The libel must be circum- " stantiate, that *it must convincingly appear, that the pan-* " *nel's intromission was not warranted by ane preceding* " *delivery*, but was a clear theftuous contrectation." (*Alexr. Steil.* Aug. 13, 1669. Hume, i. p. 60.)

In the cases now to be noticed, there is a quasi-possession of the subject, but of so temporary and transient a kind, as to leave the owner really undivested; and, accordingly, the crime of the appropriator has justly been considered theft. The cases referred to are those, (1.) of a porter running off with a bundle, which he is hired to carry; and, (2.) of a clerk appropriating money which he is sent to pay to some particular person. The errand in both of those cases is special and temporary; but it may be as well to consider them separately. With regard to the clerk, there can be no doubt that his is a pure act of theft. He gets the money for a transient purpose, without any real right being transferred to him, without such a title being conferred, as would enable a creditor of his employer to

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arrest in his hands, and indeed altogether in a way, which leaves to the owner the undoubted legal possession of his property. Like the servant, who is the custodier of the silver plate, he is merely the hand by which his employer possesses the money, and that possession is unchanged, until delivery at the place to which he was specially sent. The same observations apply to the porter, who is for the time the hired *servant* of his employer. It may be doubted, whether the goods are, at any time, out of the owner's possession; there is no delivery to the porter for himself, but expressly for another person; the owner merely avails himself of the superior strength of the porter to assist in conveying the thing to its destination; and so little confidence is reposed, that the carriage is probably performed under his own eye and superintendence. The law can scarcely regard the transient custody of the porter as a full legal possession, but will rather consider his as a qualified right, somewhat similar to, but perhaps of a more definite kind, than that enjoyed by the butler, the shepherd, or the clerk. In holding these cases to be thefts, the Court have plainly proceeded upon grounds not intended to impair, but rather calculated to strengthen the general rule. Thus, in the case of *Alexander Mackay*, (27th Decr. 1826. Syme, p. 54.) who, by the way, was not a *regular* porter, but accidentally employed in that capacity, the Court in holding the offence which he had committed, in carrying off the portmanteau of his employer, to be theft, appear to have gone upon the view thrown out by the Lord Justice-Clerk, that "*the man-*" *date given was temporary*, the most temporary of all, " and *there was nothing in his situation in regard to the* " *articles* to make his crime any thing different from " theft." So also in the case of *Duncan MacIntosh*, (Feb. 2, 1835. Shaw, xiii. p. 1168,) who having been "*porter or* " *servant in the employment*" of a mercantile company, and having appropriated money, which he had received, for the special purpose of being delivered to a certain party, was held to have committed theft, the Lord Justice-

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Clerk founded his opinion on the circumstance, " that " the delivery is for the special purpose of the money " being paid over to the persons specially pointed out, " and that, *till the accomplishment of such purpose*, " *the possession is still justly to be held in the deli-* " *verer.*"

Some other cases still remain to be noticed; but even these will not much avail in support of the present charge. It has been held that a carrier, who appropriates the contents of a parcel entrusted to his charge, is guilty of theft. According to Hume, (vol. i. p. 66.) a distinction must be made between an *occasional* and a *regular* carrier, and the pannel is not aware of any case applicable to the latter class of carriers; but perhaps neither of them should be placed in a more favourable situation than the common street porter. The same objection may be applied to both, that the custody given is transient and temporary, that there is no delivery to the carrier for himself, but *merely a mandate given him to deliver the subject* to another person. Independently, however, of this view of the case, the Court, in holding the carrier to be guilty of theft, appear to have proceeded upon the specialty of the English law, that by breaking bulk, the privity of the contract had been determined. Thus, in the case of *Mitchell*, (Shaw, p. 220), the charge against the pannel was, that he *broke open* the pack entrusted to him; in *Glen*, a case of an occasional carrier, (Alison, Vol. I. p. 253,) the charge was stealing *the contents* of a parcel; and a similar principle seems to have been followed in the case of *Dick*, (Oct. 5, 1799. Alison, i. p. 254,) who had been hired to carry a money parcel. For the pannel, the objection was urged, " that, " as the libel stated *that the parcel was given to the* " *pannel*, the fact charged was breach of trust;" but this was met by the answer, " that the parcel was " given to the pannel for a special purpose, to be carried " by him to a particular place; and *the breaking it up* " was an act of theft," upon which the objection was repelled.

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With regard to the cases of horse-hiring, on which the Prosecutor founds, it is sufficient to refer to the opinion of Mr. Hume, (vol. i. p. 69,) and to notice, that in all the cases in which a person hiring a horse, and then appropriating it, has been held to have committed theft, the element of an evident felonious intent, *ab initio*, will be found to have been present.

The only other case which it is necessary to notice, is that of *John Smith*, (Swinton, vol. ii. p. 28. March 12 1838,) in which a pannel, who appropriated a pocket-book containing money, which he found, but well knowing to whom it belonged, was charged with theft, and the relevancy sustained. The Court most properly repudiated the idea, which was strongly advocated for the prisoner, that *in every case* a felonious first-taking was necessary to theft; but, considering the offence of the pannel to have been the same, as if he had seen the pocket-book drop from its owner's pocket, and had then picked it up without restoring it, they held that, if the facts were proved, he was guilty not of breach of trust, but of the graver charge. There was this farther distinction between that case and the present, that Smith could merely be considered as a *negotiorum gestor*, as he did not receive delivery from the owner himself, and was probably the last person to whom the pocket-book would have been voluntarily entrusted.

The principles on which most of the cases above mentioned have been considered as thefts, are lucidly summed up by Mr. Hume, vol. i. pp. 63 and 66.

(3.) In England, no person who has received goods by way of bailment, which, as Sir William Jones has defined it, is the "delivery of a subject on a condition expressed "or implied, that it shall be restored by the bailee to "the bailor as soon as the purpose for which it was bail-"ed shall be answered," can be charged with theft, though subsequently to the delivery he converts the goods to his own use, (Roscoe, p. 478.) Upon this ground, it is laid down by Hawkins (Book I. ch. 33. § 2.) that, "One who has "the actual possession of my goods by my delivery, for a

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" special purpose," (as a tailor, &c.) " cannot be said to " steal them by embezzling of them afterwards." East, in his Pleas of the Crown, (vol. ii. p. 693,) states, " that *if a* " *person obtain the goods of another by a lawful delivery* " *without fraud, although he afterwards convert them to* " *his own use, he cannot be guilty of felony.* . . . . "*So if plate be delivered to a goldsmith to work,* or to " weigh, or as a deposit, his conversion of it will not be " a felony." Authorities might be multiplied in favour of the same views; but it is sufficient to quote the recent case of *Rex* v. *Levy*, (March, 9 1830. Carrington and Payne, iv. p. 241.) in which the very *species facti* here libelled was adjudged not to be theft. As the watch had been delivered to be repaired, the Judge who presided, (Vaughan, B.) held, that " it would be too much to construe this " to be a felony. It would have been different if the pri- " soner had obtained the watch by trick or fraud. *Here* " *it was voluntarily delivered to him.*"

(4.) Even if the original rule of law laid down by Sir George Mackenzie and succeeding authors has been, in some measure, relaxed by subsequent practice, it by no means follows that it has been abandoned to the full extent for which the Prosecutor must contend. The trust, if there really was any, in the cases of theft already noticed, was of a much inferior description to the unlimited confidence reposed in the present instance. There is here a manifest change of possession. The delivery is complete; whenever the watches have been left at the shop, the transit is at an end, and the watchmaker is vested with the full possession of the subject. He is, therefore, no intermediate hand, like the porter or the carrier. The delivery, which he obtains, is not a mere transference from one hand to another, as in the case of the clerk,—but a regular delivery, out of the owner's possession, into that of a stranger. Nor does his possession resemble that of the butler or the shepherd, for there is a shifting of situation—a transference *de domu in domum.* The superior confidence which is reposed in the tradesman, is indicated both by the change

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of roof, and by the power of management which is given to him over the subject. The watchmaker may take the watch to pieces, and disarrange all its intricate parts. It is delivered over to him for an indefinite time. As the cleaning and repairing may occupy six days or six weeks, no time is fixed for the re-delivery. The owner does not wish to have his property restored until the repairs have been effectually completed; and he may call for it, again and again, before it is ready to be removed. Should he desire to have his watch returned, the watchmaker is not bound to send it home; the owner must call for it at regular business hours; and should the shop be shut, he must submit to wait until it is reopened, before access can be obtained by him to his own property. Again, the watchmaker must be a party to the re-delivery; the owner cannot walk into the shop, and carry off the watch, without permission being granted. He must make a formal demand to have his property given up, and, on a refusal, must have recourse to a personal action against the watchmaker, before he can obtain it. Until his account is paid, the tradesman has a right of retention over the subject, which entitles him to keep possession of it *invito domino*. It may be competently arrested in his hands, by a creditor of the proprietor. As the legal possessor, he is the reputed owner of the watch, vested with a real right in it, and entitled to vindicate it, should it be carried off from him, *a quocunque possessore*. Should it be stolen by a third party, the correct mode of libelling it would be to describe it as *in the lawful possession of the watchmaker*; and, in this respect, our law closely follows the analogy of the Roman, which in similar circumstances gave an *actio furti* against the thief to the tradesman, but to the owner merely his *actio locati*, (Inst. iv. 1. 15.)

Taking every thing into account, it is scarcely possible to dispute, that the possession, which the pannel obtained, in his true capacity of watchmaker, was such as implies unlimited trust. It must be observed, moreover, that the *bona fide* possession of the watches, which was originally

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obtained, is not alleged to have immediately terminated; —the statement is, that having continued to possess, in perfect *bonâ fide*, the most of them for a considerable time, he at last succumbed to the temptation under which he was placed, and, on the 7th January 1839, appropriated the watches in question, two of them having remained honestly in his possession since the preceding month of August. It is difficult to conceive any case which has a stronger claim to be regarded as breach of trust, the possession having begun in *bona fide*, and having continued so for a considerable period, until by the pressure of circumstances, one hitherto of unblemished reputation was impelled to commit a crime, from which he would have shrunk, had not, unfortunately, the means of perpetrating it with too great facility been within his reach. This is precisely such a case as Mr. Alison describes as not falling under the denomination of theft. 'It has been already noticed, (he says, vol. i. p. 359,) when 'treating of theft, that if goods are carried off which have 'been put in any person's hands for a mere temporary 'purpose,—as a porter's, to be conveyed to a particular 'place,—or a clerk's, to be conveyed to a bank, or the like, 'the felonious abstraction is theft. But the case is different, both on principle and authority, where goods are 'put into a person's hands not for such a specific and 'transient purpose, but to undergo some lengthened operation, as linens to be bleached at a bleachfield, books to 'be bound at a bookbinder's, *watches to be repaired at a 'watchmaker's*, or the like. In all these cases, the depositary stands in a different situation from a mere clerk or 'porter sent on a particular errand; *his profession, and the 'purposes of his receiving the goods, imply a much higher power* of intromission, alteration, and management; 'and, therefore, his felonious abstraction or embezzlement 'falls under the description of breach of trust.'

(5.) Within the last few years, there have occurred various cases of watchmakers, charged under circumstances

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similar to the present, not with theft, but only with breach of trust. Mention may be made of the cases of *William Burton*, tried at Jedburgh in September 1824; of *Daniel Johnston*, Inverness, September 1827; *William Liddle*, High Court, 9th January 1839; and *David Caird*, likewise before the High Court, on 11th March last. In all of these cases, it is understood that the relevancy of the charge of breach of trust passed undisputed, either by the Bar or on the Bench; and the usual interlocutor of relevancy having been pronounced, convictions were obtained against the pannels. The pannel does not found upon these, as affording an authoritative rule in his favour; and he admits that it is still competent for the Prosecutor, upon cause shewn, to retrace his steps, and to hold now that to be theft, which a few months ago was allowed *per incuriam* to pass as breach of trust. But he must protest against the novel proposition which has been started on the part of the Crown, that the same *species facti* may amount to both offences at once, and may be relevantly charged, either as breach of trust, or as theft, according as it may please her Majesty's Advocate for the time. This idea is opposed both to the spirit and practice of our law; and it cannot reasonably be doubted, that where the crime clearly amounts to theft, if the indictment merely charged it as breach of trust, the Court would interpose, and, though no objection was taken by the pannel, would refuse to sustain the libel as relevantly laid. The indictments above noticed are chiefly valuable, as indicating the opinions of the experienced lawyers whose names they bear. It can hardly be supposed that Mr. Alison, Mr. Duncan M'Neill, and others, should all fall into the same *error* of charging as breach of trust an offence which amounted to theft. Many other cases might perhaps be found, in which the same course was followed; but it is only necessary to quote, in addition, the recent case of *Robert Sutherland*, (March 21 1836, Swinton, i. p. 162,) in which, according to the report, 'the question whether 'the charge fell under the description of theft or breach 'of trust, was maturely considered;' and the opinion of

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the Court was, that 'the appropriation of books by a 'bookbinder is breach of trust.'

The Prosecutor states, as a peremptory and inflexible proposition, that, 'where the holder is bound to give over 'the property, *in forma specifica*,' the appropriation is theft. It is true, that several cases have been held to fall under the category of theft, in which, the fact, that the *ipsum corpus* was to be re-delivered, was stated, and considered as of the essence of the crime; but these, it must be observed, were all cases of *clerks or servants*, carrying off money which belonged to their masters, and was entrusted to them upon a special and temporary errand. The true ground of these decisions was, that when the clerk or servant appropriated the subject, he had no real right vested in his person, but that, notwithstanding the transient mandate given to him, the thing remained *in the exclusive legal possession* of the owner. In the case of *Hugh Clinie*, (May 21 1838, 2 Swinton, p. 118,) the Court limited this rule, and introduced another criterion, by which to determine whether, *in that particular class of cases*, the offence was theft or not. By that finding, the general theory of our law, that the state of the possession at the time is the infallible test, in all cases of wrongous appropriation, of the offence which is committed, was rather confirmed than shaken; for, as it had formerly been determined, that the clerk who took money belonging to his master, was guilty of theft, in respect that his possession was the possession of his master, so it was now settled, as an exception to that rule, that, where the clerk was not bound to deliver the money entrusted to him *in forma specifica*, but merely *tantundem pecuniae solvere*, this, as indicating delivery to himself, out of the possession of his master, under a fair contract between the parties, changed the crime into breach of trust. It is obvious that the canon which the prosecutor has fixed upon, for regulating cases like the present, can only hold where the thing appropriated is a fungible, such as money; to extend it to other moveable subjects, would be tantamount to declaring that breach of

trust cannot be committed, except upon goods which are consumed in the use. When possession is given, upon some more limited title than that of property, of any subject which is not a fungible, specific re-delivery must of course be due to the proprietor; for example, things given in loan or upon hire, which must be specifically restored; and yet, in none of these cases is the offence of the appropriator declared, in our law, to be theft. The prosecutor attempts to get out of this difficulty, by plunging into another. In the face of all the decided opinions which have been quoted, he ventures to maintain, that a transference of the property is indispensibly necessary to breach of trust: 'As the pannel (he observes) was in no respect the '*dominus* of the property; as the property remained still 'with the original owners, his appropriation of it was 'therefore theft.' Now the pannel submits, on the one hand, that if the property of the watches had been actually transferred to him, as is supposed, he could not have been tried either for theft or for breach of trust, on account of their abstraction; and, on the other, that a *non-sequitur* is plainly involved in the inference that, because the property remained in the owners, *therefore* the appropriation by him was theft. Just as swindling is stated, both by Hume and Alison, to consist in obtaining, by a fraudulent bargain, the *property* of a thing from its owner; so breach of trust is explained by them to depend upon the *possession* being freely transferred, under a *bona fide* contract, while the *dominium* remains exclusively with the deliverer. The doctrine, that an *unlimited* right of administration is essential to a case of breach of trust, is quite illusory, and is in reality nothing but a corollary, deduced from the erronous proposition, that this crime cannot be committed, where the property is untransferred. The pannel does not think that *any* right of administration upon his part was necessary to bring his case under the denomination for which he contends; he can even imagine a case, where nothing but the bare *legal possession* is

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given, which, he is inclined to think, would be breach of trust; a depositary would not, he thinks, be guilty of theft, in approprating a subject entrusted to his care and keeping, although the purpose for which he has received it, is the most limited of all, being merely to retain the thing in his hands, without doing anything to it, until the owner shall re-claim it.

It appears to him that, whenever a doubt arises, under which denomination an act of wrongous appropriation should be placed, the surest way of resolving it is to inquire, not whether the person to whom the subject was given, had a right of administration conferred upon him, but whether the party, by whom delivery was made, *continues* in the exclusive administration of it, notwithstanding the delivery. Every case, in which the proprietor's use and possession of the subject has ceased for the time, may be said to be breach of trust, and *vice versa*. Admitting, however, that a certain power of administration is necessary, to entitle an accused party to raise the present plea, the pannel conceives that he was, to all intents, vested with a sufficient controul over the property in question. He has some difficulty in understanding what is meant by the right of *administering* a watch; but, if the Prosecutor intends to apply the term to the common uses of which that article is susceptible—the rolling it up, the telling the hour by it, the regulating it, the pannel had certainly a full power of administration. If he had borrowed it gratuitously from the owner, his right of controul over it would have been much more limited than it was over watches which were delivered to him, to undergo the process of cleaning and repairing; for, as Mr. Alison well observes in a passage already quoted, "His "profession, and the purposes of his receiving the goods, "implied a much *higher power of intromission, altera-* "*tion, and management.*"

The case came to be advised this day, when the following opinions were delivered:—

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The LORD JUSTICE-GENERAL.—My present impression, I confess, is, that the crime charged in the Indictment amounts to theft, in respect that the articles were delivered, for the purpose of being restored to their respective owners, *in forma specifica*. But I should wish to hear the opinions of the rest of the Court on the subject.

The LORD JUSTICE-CLERK.—A number of cases of this nature have recently occured, which have been fully argued, either in Informations, or at the Bar; and I am far from wishing that we should come to any determination in this case, by which we should seem to doubt the propriety of these decisions. But the very same principle that guides me in thinking, that we ought to abide by these decisions in all time coming, leads me also to say, with the utmost deference, that I am, in this case, of opinion, that the proper charge against the pannel would have been one of breach of trust. In all these cases, to which I have referred, in which the charge of theft was found relevant, there was a limited mandate, for a temporary purpose, and for a short time. But when I look to the *species facti* in this Indictment, namely, that the watches which the pannel is said to have appropriated, were delivered to him, either to be cleaned or to be repaired, I cannot help supposing that it was in the contemplation of all parties, that the operation would require a lengthened possession. The question then arises, whether, in these circumstances, the party who appropriates an article of which he has been put in full possession, is guilty of theft. In the able Information for the pannel it is most distinctly stated, that the recent practice in this Court has been to charge a person in the same circumstances as the pannel, with breach of trust only. Reference is made to four cases of appropriation by watchmakers of the watches committed to their care, which were so charged. And, in further illustration of the principle on which these cases proceeded, we have the case of Sutherland, (March 21, 1836,) in

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which the Court found that the appropriation by a book-binder of books left with him to be bound, is breach of trust, and not theft. Now, I beg to say for one, that though the authority of these cases would certainly have been greater, if the point of relevancy had been raised, I consider myself under a solemn obligation to let no Indictment pass, without being satisfied that the charge which it contains, is relevantly laid. Looking, therefore, to the precedents which have been referred to, I am of opinion that we ought to adhere to the course of decisions which I hold to have been pronounced by the Court. And I say further, that my opinion on this subject is strengthened by a consideration of the doctrines laid down by the greatest authorities in our criminal law. The public prosecutor, in support of the position which he has assumed, has felt himself compelled to attack the principles laid down by that great authority, whose name will ever be venerated in this Court, Mr. Baron Hume. I confess, I am for adhering to the doctrines of Mr. Hume on this subject, especially as I find in these doctrines nothing inconsistent with the decisions which the Court have recently pronounced.

LORD MEADOWBANK.—I am extremely sorry that I am compelled to differ from the opinion which has just been delivered. In regard to the weight due to the authority of Baron Hume, I do not wish to reflect, in the least, upon the doctrines laid down by that distinguished author and eminent man. But I cannot omit to notice, that he himself states, that at the period when he wrote, this point as to the distinction between theft and breach of trust, had not been authoritatively settled. I think it is extremely desirable that one general and uniform decision, in all such cases, should, if possible, be arrived at. And in the cases which have recently occurred on the subject, we have had before us the admission of Baron Hume himself, that the practice of the Court "had not attained to sufficient maturity in these matters." He lays down some propositions which have been entirely upset by sub-

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sequent decisions. In pronouncing these decisions, the Court did no more than what Mr. Hume anticipated. The only wonder connected with the labours of that great author is, that, in treating of a system which was so crude, and, in many instances, with nothing to guide him but deductions from principle, he should have been able to produce a work of such great and lasting authority. But it has never been held, that the law as laid down by him, should be considered as in every point fixed and unchangeable. What has been the case in regard to the law of England? Why, upon one of the most important questions in the whole range of criminal jurisprudence, namely, what constituted rape, and whether the absence of consent must always be presumed in the case of females of immature age, the judgments of the English Courts varied backwards and forwards for half a century. And if by finding that the present charge amounts to theft, we desert the authority of Mr. Hume, we shall at least pronounce a judgment conformable with that of our brethren who sat on the Bench two hundred and thirty years ago. For, in the case of Margaret Hertsyde in 1608, referred to in the Information for the pannel, whatever was the verdict of the Jury, we have the decision of the Court, that the fact of jewels being purloined by a person in whose lawful custody they were, was sufficient to found against the offender a charge of theft. I think that this judgment, and the grounds on which it proceeded, is consistent with the decisions pronounced by the English Judges, and especially with that in the case of Bernard N'Namee in 1832, where a conviction for theft was held to be right, although the first possession was innocent, on this ground, "that, as the owner parted "with the custody only, not with the possession, "the prisoner's possession was the owner's." Now, it appears to me, in this case, that when a party puts his watch into the hands of a watchmaker to be cleaned or repaired, he only parts with the custody, that the possession of the watchmaker is the possession of the owner, and that the watchmaker, in appropriating it,

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takes it out of the lawful possession of the owner, and is so guilty of theft. If we so decide the question now before us, it appears to me that we shall be relieved of difficulty in all future cases of a similar nature.

LORD MACKENZIE.—My opinion concurs with that last delivered. I think that we have already, in numerous cases, departed from the authority of Mr. Hume in this matter. One of the most remarkable instances of this was the case in which we found that the appropriation, by a pannel, of an article found on the highway, the owner of which is well known to him, is theft. We have also decided that a carrier, who appropriates goods given to him to be conveyed to a certain destination, is guilty of theft. The opinion of Mr. Hume in regard to this offence is, that in the case of a regular carrier, it is not theft. So also in the case of a horse hired without any felonious purpose, and afterwards carried off by the hirer, we have decided that a theft is committed. But that decision is contrary to the opinion of Baron Hume, who makes the distinction between theft and breach of trust depend on the character of the first acquiring. Then looking to the charge contained in the present Indictment, I am not able to think that it is less than theft. I cannot see any difference,—except a difference which adds to the difficulty of the theft,—between the case of a watchmaker and that of a carrier. I presume that if a party gave goods into the charge of a carrier, which, instead of being delivered to another person, were to be delivered to himself, the Court would not hold that this made any difference as to the crime committed by the carrier, supposing that he abstracted them. And why shall we say that delivery of a thing, without transferring either the property or the possession, does not bar theft, when the operation to be performed is removal over a certain space, and that it does bar theft, when that operation is the cleaning or repairing of the article. It may be true that there is no absolute limitation in the time which the operation, in the case before us, might require. But in a

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case such as that before us, the time is not unlimited. It is known that the operation can be performed within a certain time; and it is in the expectation of that time proving sufficient, that the article is given out of the owner's custody. There is this farther circumstance to be taken into account, that in the case of the carrier, the article remains more under the eye of the owner, than it does in that of the watchmaker. On the whole, I am of opinion that we have gone so far, that it is not possible for us to stop. I think we must hold here, as we have done in those other cases to which I have referred, that there was no such transference of the possession as to make the appropriation a less crime than theft. It may be that in practice we have sustained cases as breach of trust, which might properly have been tried as theft. Now, in regard to the argument thus raised, the only answer that occurs to me, is, that theft and breach of trust have not been considered opposed to one another, and that the Court has held them to be similar crimes, to the extent at least of admitting confessions of the one, when the *species facti* libelled might perhaps have amounted, in strictness, to the other. I am the more inclined to think that this may have been the opinion of the Court, because I find an opinion to that effect in my own notes. And I am not yet convinced that the conclusion is illogical, which holds that the same act may sometimes fall under two different kinds of offences. If a butler steal wine from his master's cellar, and an indictment is raised against him, under the *nomen juris* of breach of trust, it cannot surely be held that that is equivalent to a decision that the crime was not theft. I agree with the Lord Justice-Clerk, that we are bound to look at indictments, even although no objection is taken, before pronouncing an interlocutor of relevancy. But it is a different thing to say, that if the Prosecutor is satisfied to try the pannel for the lesser crime, the Court ought to interfere with the objection that the

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species facti might have been tried under a harsher name. Our decision on this indictment will, perhaps, tend to diminish the number of cases in which breach of trust will be charged. But I am of opinion that we cannot come to any other decision, consistently with the judgments which we have already given.

LORD MONCREIFF.—I certainly regret much that I should differ from so high an authority as the Lord Justice-Clerk. But I do not think that, consistently with our late decisions, we can come to any other determination than that this is a case of theft. If the principle were, that this crime could not be committed, when the article came into the power of the pannel with the consent of the owner, that principle would exclude from the category of theft the cases of the carrier, the porter, the hirer of a horse. But I apprehend that the decisions which we have given in these cases, proceeded on the fact, that the owner's consent to the transference of the possession is only a qualified and conditional consent, for a special and particular purpose. In the case before us, the pannel gets the watch solely for the purpose of cleaning or repairing it, with the clear expectation and intention of the owner, that it is to be restored to him so soon as that operation is completed. Now, I do not think we can hold his appropriation of the watch, in these circumstances, to be anything but the crime of theft. Although the article came at first lawfully into his possession, the principle of law is, that the felonious taking is at the moment he forms the resolution of appropriating it to his own use. I am not much moved by the circumstance, that a great many indictments, for acts similar to that here charged, have been found relevant, though laid as breach of trust only. Breach of trust is the minor charge, and, although I perfectly agree with the Lord Justice-Clerk, that interlocutors of relevancy are not to be pronounced without consideration, yet I can see quite well how, when an offence is charged under a lesser *nomen juris* than that under which it might have been brought,

no objection should be taken to an indictment so laid. For although I do not wish to express a deliberate opinion on this point, I am at present inclined to think, that the same act may sometimes be charged either as theft, or as breach of trust. I cannot therefore hold the practice of the Court conclusive of the point now under discussion. There is undoubtedly a case referred to, as having occurred in this Court, in March 1836, the case of Sutherland, in which the appropriation by a bookbinder of books left with him to be bound, was charged as breach of trust only. But your Lordships will observe what the nature of that case was. It is expressly stated by the Reporter, that no objection was taken to the relevancy of the Indictment, but that the question whether the charge fell under the description of theft or breach of trust was maturely considered. I have no doubt there may have been some discussion on the Bench on the subject, although I have no recollection of such having been the case. But, at all events, the decision of the Court was not pronounced after argument. I will not say, that if we decide this to be a case of theft, we shall not in effect be reversing that decision. And yet there is a considerable difference. When a book is delivered to be bound, the operation which it is to undergo is not a mere cleaning or repairing; the form of it is to be entirely changed. The power of administration by the bookbinder is much greater than was given to the watchmaker in this case. It is quite true that Baron Hume lays down the crime here charged as breach of trust only. But, as Lord Meadowbank observed, he himself says, that the law on this subject was not fully matured at the time he wrote. Then I attach great weight to the train of decisions in England, which are decidedly favourable to the view maintained by the public prosecutor. On the whole, while I regret extremely to differ from the Lord Justice-Clerk, I am of opinion that the Indictment ought to be sustained.

Lord Medwyn.—I shall be extremely happy if the judgment we are to pronounce this day, shall prevent all doubt between the crimes of theft and breach of trust. I

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confess I doubt if such precision will take place, till you abolish the distinction between the two, and revert to the Roman law on the subject. But notwithstanding the opinions I have heard, I have great difficulty in concurring with those which hold the *species facti* here to import the crime of theft. I have great difficulty in holding that the great authority on our criminal law,—indeed all our authorities, Burnett and Alison, as well as Hume, and also the whole course of our practice, have proceeded on a mistake as to the description of cases which constitute theft,—and by following too closely the definition of the Roman law, have excluded from the category of thefts, cases which should have been considered such, and not as breach of trust only. It is singular that our authorities should have erred in this matter, granting that it should have arisen from this cause, since by the Civil Law no distinction was made between theft and breach of trust, and their definition was held to embrace both descriptions of offence. On this account, I dismiss at once the authorities from that law, for our jurisprudence, from the earliest times, consistently, I think, with reason and common sense, has admitted that there is a distinction between theft and breach of trust; and although Her Majesty's Advocate wishes to narrow the one class of cases, and increase the other, he does not contend for sweeping away the distinction altogether. His views regarding the present case are founded on certain decisions which have occurred, the first, Mackay in 1826, the last, Michie in January 1839, where a porter, a carrier, or a shop-boy, having received an article to deliver to a particular person immediately, and having failed to do so, has been found guilty of theft, because the possession is given for a mere temporary and specific purpose, and to one in the employment of the deliverer. Now, although these cases be soundly decided, (and I concurred in them,) I am not prepared to extend the category of theft to such a case as this. The watches are put into the hands of a watchmaker to clean and repair. The contract between the tradesman on the one hand, and the owner on

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the other, is, that the one shall perform the operation, and restore the same article cleaned and repaired, and the other shall pay the price. It is given into his custody for this purpose—it is put into his house—it is retained there for a long time—here a watch given in August is said to have been stolen in January. In all former periods of our practice, such a case would have been considered as breach of trust only; and four recent cases are mentioned in the excellent Information for the pannel, where that form of charge was adopted, two of them within this very year, in the High Court. But if this new light is to be followed, which has suddenly awakened Her Majesty's Advocate to the errors of our practice, it will have a very wide effect indeed. Such a case as Sutherland the bookbinder's must have been wrong decided; yet it is said to have been maturely considered; and if I recollect aright, I started the difficulty myself, but was overruled. This was so late as March 1836. In England the very same case occurred (*Levy* 1830,) and it was not held to be felony. I cannot say that I think it an unsound distinction, that if one not in the employment of the owner, receives an article upon a fair contract, the object of which necessarily gives him the possession for a considerable time, but to return it on the contract being completed, and he appropriates it to his own use, this is breach of trust, and not theft. It would be different if one gave his watch to a man to wind up or to look at, and he ran off with it, or if he shewed a book to a bookbinder with a view of selling it to him, and he decamped with it. The possession in that case is so temporary, the trust is nothing; so that the conversion to his own use must be theft. The distinction may be nice, and somewhat thin; but still I think it substantial. There is a trust in the one case; there is none in the other. In the cases already alluded to of the servant, carrier, and shopboy, though there is some trust in the common sense of that word—and that made the difficulty in these cases—it is a trust of so low and temporary a kind, as should not have led to a breach of duty; and we have therefore now

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classed these cases with theft. But that is not to make us take a much wider step, and hold that the trust in such a case as this, is of so slight and transient a kind as to lead to the same result.

LORD COCKBURN.—I do not conceive that it is necessary for me to say anything, except that I perfectly concur with the majority of the Court; and that I have come to that opinion on the grounds which have been already so fully stated.

The LORD JUSTICE-GENERAL.—My former opinion has been strengthened by what I have heard from the majority of the Court. I never can think that the fact of the Public Prosecutor having indicted a party for a minor offence, can be quoted as an authority to prove that the act of which he has been guilty, cannot fall under a more aggravated *nomen juris*. Take for instance, the case of murder and culpable homicide. Every murder is a culpable homicide; but every culpable homicide is not a murder. Now, suppose that the Prosecutor should charge a certain act as culpable homicide, that never could be pleaded as an authority to prove that an act of the same kind could never, in future, be charged as murder. Or suppose the case of a prisoner who had been guilty of hamesucken. There might be some doubt as to whether the house in which the assault was committed, was the proper residence of the party assaulted; and the Public Prosecutor might therefore charge the crime as assault, without loosing the power of afterwards proceeding against a similar offender, as for the higher species of crime.

The Court accordingly found the *species facti* libelled in the Indictment relevant to infer the crime of theft against the pannel George Brown, and repelled the objection to that charge; and further, found the libel as laid relevant to infer the pains of law against both pannels;

but, on the motion of the Public Prosecutor, deserted the diet against them *pro loco et tempore*.[1]

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Theft.

Present,

July 16 1839.

LORDS MONCREIFF, MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE—*Innes—Davidson.*

AGAINST

GRACE M'GINNES and ISABELLA JOHNSTONE—*B. R. Bell.*

UTTERING BASE COIN.—EVIDENCE.—On a trial for uttering base coin, one of the coins alleged to be bad, which was admitted to have been in the hands of the Public Prosecutor, and had been libelled on as a production, not being produced to the Jury,—held, that the best evidence of the baseness of that coin had not been brought, and the charge of uttering it accordingly found not proven.

GRACE M'GINNES or WALKER, and ISABELLA JOHNSTONE or MURRAY, were charged with contravention of the Act 2nd William IV. c. 34, entitled, 'an Act for 'consolidating and amending the laws against offences re-'lating to the coin,' by uttering and having in their possession base coin.

No. 69. Grace M'Ginnes and Isabella Johnstone.

Uttering base coin.

They pleaded not guilty, and a proof was led.

One of the shillings alleged to be bad, and which was libelled on as a production by the Public Prosecutor, had,

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[1] The pannel Brown was brought to trial before Lords Mackenzie and Medwyn, at the Circuit Court of Justiciary, held at Perth on the 30th September 1839, when he pleaded guilty of the first, second, sixth, and seventh charges libelled; and was sentenced to be imprisoned in the Tolbooth of Dundee, for the period of twelve calendar months. No farther proceedings took place against the pannel Johnstone.

No. 69. Grace M'Ginnes and Isabella Johnstone, July 16 1839.

Uttering base coin.

in the course of the trial, fallen aside, and could not to be produced.

LORD MONCREIFF, in his charge to the Jury, stated, that though there was a difference of opinion on the Bench, his own opinion decidedly was, that as the Public Prosecutor had had the shilling in question in his possession, and had libelled upon it as a production, he had not exhibited the best evidence in his power, by not producing that shilling; and that, therefore, the pannels were entitled to the benefit of the accident that had occurred.

The Jury found the libel not proven.

In respect of which verdict of Assize, the pannels were assoilzied *simpliciter*, and dismissed from the Bar.

NORTH CIRCUIT.

Autumn 1839.

Sept. 19 1839.

INVERNESS.

Judges—LORDS MACKENZIE and MEDWYN.

HER MAJESTY'S ADVOCATE—*Napier*.

AGAINST

HUGH FRASER.—*E. S. Gordon*.

DISTURBING DIVINE SERVICE.—STATUTE 1587, c. 27.—EVIDENCE.—

1. A pannel convicted of contravention of the statute 1587, c. 27, by intruding himself without a token at the communion table, and refusing to remove when desired to do so, both by the officiating clergyman, and by a Justice of the Peace. Sentence, Escheat of moveables.
2. An extract from the records of a kirk-session found inadmissible as evidence, in respect it was not signed on every page.
3. It is incompetent to prove the judgment of a kirk session by parole evidence.

No. 70. Hugh Fraser, Inverness, Sept. 19 1839.

Disturbing Divine Service.

HUGH FRASER, schoolmaster of the parish of Kirkhill, in the county of Inverness, was charged with Breach of the Peace, as also Profanity, especially when the said crimes, or either of them, are committed in church, and during the time of divine service, and to the disturbance and disquietude of the congregation, as also with contravention of an Act passed in the eleventh Parliament of the reign of James the Sixth, chapter twenty-seven, intituled 'Punishment of troublers of the kirk, invaders of Ministers, and of excommunicat persones, entrand into the 'kirk,' by which it is statuted and ordained, 'That quhatsumever person or persones, sall happen hereafter to 'perturbe the ordour of the kirk, in time of divine service, or to make ony tumult, raise ony fraie, either in 'kirk or kirk-zaird, quhairthrow the people then convened sall happen to be disordered, troubled, or dispersed; the same sall be ane point of dittay, and the 'persones to be convict thereoff, sall tyne all their moveable gudes, to be escheit to Our Soveraine Lord, for their 'offense; but prejudice of greater punishment, gif there 'happen ony greater offense, as slauchter, bloud, mutilation, schutting of hag-buttes and pistolettes, according 'to the lawes of this realme.'

IN SO FAR AS, the said Hugh Fraser, being parochial schoolmaster of the parish of Kirkhill aforesaid, and being well aware that, by the laws and practice of the Church of Scotland, of which he became, or professed himself a member, on being appointed schoolmaster aforesaid, no person is entitled and warranted to sit down at the communion table, and participate, or attempt to participate, in the dispensation of the Sacrament of the Lord's Supper in any parish church, without the sanction or consent of the minister or kirk-session of such parish, and without having previously received or obtained from, or by authority of the said minister or kirk-session, a token in evidence of such sanction or consent: And the said Hugh Fraser having at one time been in full communion with the Church of Scotland, and a communicant in the said parish of Kirkhill, and thereafter having been, by the kirk-session of the said parish, and in particular, by the unanimous resolution or sentence of a meeting of the said kirk-session, held on or about the 13th day of June 1835, suspended from, or refused the privilege of commu-

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nicating at the dispensation of the Sacrament of the Lord's Supper in the church of the said parish, and refused a token of admission to the communion table; and the said resolution or sentence of the said kirk-session having been intimated to him; and he having appealed therefrom to the Presbytery of Inverness, and the said Presbytery having dismissed his appeal, and approved of the conduct of the said kirk-session, in refusing to admit him to the privileges of a communicant; and he having thereafter appealed to the Provincial Synod of Moray, against the said sentence of the said Presbytery, and the said Synod having dismissed his appeal, and confirmed the said sentence of the said Presbytery; and he thereafter having taken an appeal to the General Assembly, held in the year 1836, against the said sentence of the said Synod, and the Commission of the said General Assembly having, on or about the 1st of June 1836, dismissed his appeal, and affirmed the said sentence of the said Synod: And the said Hugh Fraser, on the occasion of the dispensation of the Sacrament of the Lord's Supper in the church of the said parish of Kirkhill, on or about the 19th day of June 1836, having, then and there, in defiance of the authority of the said several church courts, and their said several sentences, wilfully intruded himself, and sat down at the communion table, and having, after refusing to withdraw, been forcibly removed therefrom; and the said Hugh Fraser, on the occasion of the dispensation of the Sacrament of the Lord's Supper in the church of the said parish, on or about the 11th day of June 1837, having then and there, in continued defiance of the authority of the said several church courts, and their said several sentences, again wilfully intruded himself, and sat down at the communion table, and having, after refusing to withdraw, been forcibly removed therefrom; and the said Hugh Fraser not having been restored against the said several sentences and proceedings, or any part thereof, and being still under suspension from, or debarred the privilege of a communicant in the said parish as aforesaid, and not having applied for, nor obtained the sanction or consent of the minister or kirk-session of the said parish to his being admitted to the Communion table, or in any way participating at the dispensation of the Sacrament of the Lord's Supper in the church of the said parish in the month of June 1838, and not having applied for, nor obtained from, or by authority of the said minister or kirk-session, a token of admission to the Communion table on the said occasion; and being still parochial schoolmaster of the said parish of Kirkhill, and being, or professing to be, a member of the Church of Scotland, the said Hugh Fraser did, upon the 10th of June 1838, and within the parish church of the said parish of Kirkhill, and during the time of Divine service, and while the congregation were then and there assembled on the occasion of the dispensation of the Sacrament of the Lord's Supper, wickedly, wilfully, profanely, and unwarrantably, intrude himself and sit down at the Communion table, among the communicants

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of said congregation, then and there assembled, and having been requested by the Reverend Alexander Fraser, minister of the said parish, then officiating, or about to officiate, in dispensing the Sacrament of the Lord's Supper, to withdraw from the Communion table, and having refused to retire, though repeatedly requested and called upon to do so by the said Reverend Alexander Fraser, and though remonstrated with, and urged, and commanded to withdraw, by William Campbell, residing in Muir of Kirkton, in said parish, and Alexander Sinclair, tacksman of Bunchrew, in said parish, both, or one or other of them, elders of said parish, and by George France, Esquire, one of the members of said congregation, and one of her Majesty's justices of the peace for the county of Inverness, and acting in his said character of justice of the peace, at the request of the said Reverend Alexander Fraser, as the said Hugh Fraser well knew; and the said Hugh Fraser having intimated that he would not withdraw, and would resist being forcibly removed, and the said Reverend Alexander Fraser having therepon directed that force should not be used to remove him, but having publicly announced that he would not be permitted to communicate or partake of the elements of the Lord's Supper, and the elders engaged in dispensing the elements of bread and wine on the side of the Communion Table where he sat, having accordingly, as instructed by the said Reverend Alexander Fraser, passed him over, he the said Hugh Fraser did, then and there, while the cup containing the wine was passing from one to another of the communicants seated on the opposite side of the table, wickedly, violently, forcibly, and unwarrantably, and profanely and indecently snatch at and seize hold of the said cup, and partake or attempt to partake of its contents; and all this the said Hugh Fraser did, in opposition to the authority of the said Reverend Alexander Fraser, and the remonstrances of the said elders, and in breach of the public peace, and to the disturbance of the order of the church during the time of divine service, and to the great disturbance and disquietude of the congregation, and to the interruption of the dispensation of the solemn ordinance of the Sacrament of the Lord's Supper, and to the grievous outrage of the religious feelings of the communicants and other members of the said congregation, and to the great scandal of all pious persons.

E. S. GORDON, for the pannel, objected to the relevancy of the Indictment, which was in many respects one quite novel in this court. (1.) The first charge is "breach of the peace." This is a *nomen juris* applicable to all those classes of offences which are committed or accompanied by violence; but it is not so specific, and does not convey in such clear terms the nature of the offence charged, as is necessary in order to its being sustained as a suffi-

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nicating at the dispensation of the Sacrament of the L[ord's Supper] in the church of the said parish, and refused a token o[f admission, then and there assembled] communion table; and the said resolution or sente[nce of the Reverend Alexander Fraser, minister] session having been intimated to him; and he h[aving been about to officiate, in dispensing the Communion Elements, repeatedly requested and called upon him to withdraw from the Communion Table, and] from to the Presbytery of Inverness, and the [Presbytery having repeatedly requested and though reasonably entreated him to withdraw, by William Campbell, reti]red dismissed his appeal, and approved of the co[ncurrence of Hugh Fraser, and Alexander Sinclair, tacksman] sion, in refusing to admit him to the privile[ges of the said Hugh, and that one or other of them, elders of] he having thereafter appealed to the Provin[cial Synod of Ross, one of the members of which Synod, one of the] the said sentence of the said Presbytery [was a justice of the peace for the county of Inverness, one of the] dismissed his appeal, and confirmed the [sentence of the said Presbytery, and intimated that he] bytery; and he thereafter having tak[en the said Hugh Fraser, as the said Presbytery removed, and the] sembly, held in the year 1836, agai[nst the said sentence, directed that force should be used, and the] nod, and the Commission of the s[aid General Assembly unanimously enjoined that the] about the 1st of June 1836, dism[issed the appeal, and confirmed the] sentence of the said Synod: A[nd the said Hugh Fraser, having intimated that he] of the dispensation of the Sacr[ament of the Lord's Supper in the church] of the said parish of Kirkhi[ll, and having, then and there, in the face of the General] having, then and there, in [the face of the said congregation, violently removed, and] church courts, and their [sentence unanimously enjoined that force should be used, and the] self, and sat down at th[e Communion Table, and refused to withdraw, and] to withdraw, been forc[ibly removed by the officers of the General] ser, on the occasion [aforesaid, in obedience to the mandate] Supper in the chr[esaid, and in execution of the sentence] June 1837, hav[ing been pronounced by the Synod of Ross, and] authority of th[e Commission of the General Assembly, the] veral sentenc[es of the Synod of Ross and Commission of the] at the comr[Assembly, and not having been forcibly removed] been forci[bly from the Communion Table, and not having] not havir[withdrawn from the same, the said Hugh Fraser] proceedi[ng to officiate, in dispensing the Sacrament of the] from, c[Lord's Supper, in the said church, on the] aforer[esaid occasion, and in the face of the said con]sent[ence, and in contempt of the authority of the] mi[nisters, elders, and deacons, and other] j[udicatories of the Church of Scotland, and] [al courts. But the act of going to the Com-] [table, for the purpose of partaking of the ele-] [its, is not only not criminal in itself, but, apart from] the peculiar laws of the Scotch Establishment, is proper and religious; and it ought therefore to have been set forth that it was done with a criminal intent, that is, with the intent of profaning or mocking religion, on the particular sacrament alluded to. (3.) The *third* charge is founded on a part of an *old statute*, 1587, *cap.* 27. It is submitted that it would be exceedingly dangerous to have recourse to such old statutory laws for the protection of

[ves the] [vely, and not] [ge is "*profanity.*"] [t charge, but there are] [dictment to warrant it. The] [een committed by the pannel may,] [ry to the laws of the Church of Scot-] [fore unwarrantable, and punishable by the]

…are unnecessary, if the common law … such alleged offences, and if the …cient power to do so, such sta… resorted to. The statute in … the reformation, when the …h churches were frequent… those entertaining dif… kingdom was in a …ime (1587), when …d religion, and …vernment, as …atified by …on acts state …ight be …he presby… every person as … once a year. But …1587, c. 27,) to con… …day at the present day, the … upon the first part only, which …ply to this case. The first part, anent …t of troublers of the kirk," with the clause …e Indictment, was evidently intended to apply … serious disturbances directed against the congre…on. The *second* part of the statute relates to the "invaders of ministers," or those who attempted to molest the Clergymen. The *third* part directed against "excommunicat persones entrand into the kirk," is that which properly applies to this case, and it is not quoted in, or founded upon in the Indictment. The minister is therein directed, if an excommunicated person entered the church during divine service, or the administration of the sacrament, to call upon him to depart; and if he did not depart, the services were to be continued, and after they were finished, the party offending was to be seized and taken before the judge ordinary of the bounds, who was to ordain him to find caution to the satisfaction of the

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minister to make reparation to the church. No punishment is directed to be inflicted by the civil Magistrate, because, being an ecclesiastical offence, the church judicatories are the proper Courts in which to try it. The pannel has, indeed, been tried ecclesiastically, for an offence similar to the present, and punished. His conduct did not amount to the disturbance which is pointed out in the first part of the statute, and if it did not amount to a breach of the peace, it was an ecclesiastical offence, and cognizable by the civil courts only to the extent sanctioned by the last part of the statute.

NAPIER, for the prosecution, answered.—(1.) Breach of the peace is a proper designation for the conduct, on the part of the pannel, which is set forth in the Indictment. It is not necessary to justify such a charge, that actual violence take place; and, accordingly, Mr. Hume introduces the crime of sending threatening letters under the head of breach of the peace. (2.) The charge of profanity, in like manner, is a relevant charge, and is relevantly stated. The conduct of the pannel, in creating such a disturbance in church, amounted to profanity, and Mr. Hume places contravention of the statute 1587, libelled on, under the head of profanity. (3.) That statute is not in desuetude. On the contrary, a libel founded on it, was found relevant in the year 1703, (Cases of *Forbes* and *Reid*, Hume, vol. i. p. 573.) It is not necessary that all the matters set forth in the first clause of the statute should concur, in order to infer a contravention of the act. The words are alternative, referring to any person who shall "perturbe the ordour of the kirk, *or* make ony tumult, raise ony fraie," &c.; so that any one disturbing the order of the church was liable to the punishment. The absence of any tumult was, therefore, of no consequence to the relevancy of this charge under the first clause of the statute; the last clause does not apply to this case.

The Court, after consulting for a short time, repelled the objections.

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Disturbing Divine Service.

The pannel pleaded not guilty, and a proof was led.

WILLIAM GUNN, Session-Clerk of the parish of Kirkhill, having been sworn,—

NAPIER, for the prosecution, proposed to prove by him an extract of the minutes of the kirk-session of Kirkhill, dated 13th June 1835, which was libelled on as a production.

E. S. GORDON, for the pannel, objected, that the document was not a regular extract. It consisted of five pages, and was only signed by the Clerk on the last page. A formal extract required to be signed by the proper clerk on each page.

NAPIER, for the prosecution, answered,—that the document was in all respects regular. It was signed by the session-clerk on the fifth page, who certified that that and the four preceding pages were accurately extracted from the session-books, of which he was the custodier. At all events, he was entitled to prove by the clerk, that the document was an examined and correct copy, taken from the books which he had with him.

E. S. GORDON, for the pannel, replied—that the extract was informal; that the judgment of a Court can be proved only by the best evidence, a formal extract from their records, or the original judgment itself; an examined copy is not an extract, and is but secondary evidence, and therefore, not admissible,—and the kirk-session books have not been libelled on, and are not admissible.

The Court sustained the objection.

NAPIER, then proposed to ask the witness, whether the session had not suspended the pannel from church privileges.

E. S. GORDON, objected, that this was an attempt to prove a judgment of a Court by parole testimony.

The objection was sustained.

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The proof established, not that the pannel had acted violently or forcibly, but that he had taken his seat at the table, and even communicated, or attempted to communicate, without being possessed of a token, and that he had refused to remove, although desired to do so, both by the clergyman and by a Justice of the peace.

The Jury unanimously found him not guilty of a breach of the peace, and not guilty of profanity; but found him guilty of a breach of the statute libelled.

In respect of which verdict of Assize, the Court ordained the whole moveable goods and gear of the said Hugh Frazer to be escheat and inbrought to Her Majesty's use, and ordained the same to be recovered by the proper officer in Exchequer.

SOUTH CIRCUIT.

Autumn 1839.

JEDBURGH.

Sept. 16 1839.

Judge—LORD COCKBURN.

HER MAJESTY'S ADVOCATE—*Innes.*

AGAINST

GEORGE MILL AND OTHERS.—*B. R. Bell.*

DEFORCEMENT.—In an Indictment for rescuing a deserter from a military party, the word "deforcing," struck out on objection, as applicable only to the obstruction of a civil officer.

No. 71. George Mill and others.

Assault, &c.

GEORGE MILL, JOHN WIGHT, JAMES RUTHERFURD, and GEORGE LINDSAY, were charged with the wickedly and feloniously Assaulting, Obstructing, and deforcing any Soldiers or Officers of the army, when employed in

apprehending or guarding a deserter from the army, whereby such deserter is enabled to escape and escapes; as also Assault, more especially when committed to the injury of the person and the effusion of blood, and upon officers of the law engaged in the execution of their duty.

No. 71. George Mill and others, Jedburgh, Sept. 16 1839.

Assault, &c.

IN SO FAR AS, (1.) on the 29th of June 1839, George Trotter, sergeant in the 92d Regiment of Foot, George Bennet, corporal in the said regiment, and Alexander Anderson, a private in the said regiment, all residing at Melrose, in the county of Roxburgh, or one or more of them having in their lawful custody or charge James Scott, a deserter from the 91st Regiment of Foot, the said George Mill, John Wight, James Rutherfurd, and George Lindsay, did, all and each or one or more of them, time above libelled, in Earlston, and in the immediate vicinity thereof, wickedly and feloniously attack and assault the said George Trotter, George Bennet, and Alexander Anderson, or one or more of them, and did seize hold of them, and did strike them, or one or more of them, and did otherwise maltreat and abuse them, and did by threats, and violence, rescue the said James Scott from their custody, and did enable him to escape, and he escaped accordingly: LIKEAS, (2.) Time and place above libelled, Alexander Thomson, sheriff-officer in Kelso, and John Findlay, head constable in Selkirk, having, in the execution of their duty as officers of the law, apprehended, or attempted to apprehend the said James Scott, the said George Mill, John Wight, James Rutherfurd, and George Lindsay, did, all and each or one or more of them, then and there, wickedly and feloniously attack and assault the said Alexander Thomson and John Findlay, and did seize hold of them, and did kick and jostle them, and did repeatedly throw them to the ground, and while lying there, did kick them on various parts of their bodies, and did otherwise maltreat and abuse them, by all which they were injured in their persons to the effusion of their blood, and the said deserter James Scott was thereby enabled again to escape, and did again escape accordingly.

B. R. BELL, for the pannels,—objected to the relevancy of the Indictment, in respect that the crime of deforcement can be committed only against an officer of the law, acting under a regular warrant granted by a Magistrate in a civil or criminal process. If there is a special statute authorising the apprehension of deserters, it ought to have been libelled on.

INNES, for the prosecution, answered,—The charge is not made under the *nomen juris* of deforcement. The

No. 71. George Mill and others, Jedburgh, Sept 16 1839.

Assault, &c.

Indictment, by setting forth that the soldiers were deforced, merely implies that the abstraction of the deserter was completed.

LORD COCKBURN.—The charge would be sufficient without the word "deforcing." I am not aware of any case in which deforcement of a military officer has been charged.

The words "obstructing and deforcing" were accordingly struck out of the major proposition of the Indictment.

The pannels pleaded not guilty; and a proof was led.

The Jury unanimously found them guilty, Rutherfurd of both charges in the Indictment, Mill of the first, and Wight of the second.

In respect of which verdict of Assize, they were sentenced to be imprisoned in the Jail of Greenlaw, the pannel Rutherfurd for three, and the pannels Mill and Wight, for two calendar months.

HIGH COURT.*

Present,

Nov. 7
1839.

THE LORD JUSTICE-CLERK.

LORDS MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE—*Lord Advocate Rutherfurd—Napier.*

AGAINST

RICHARD CAMERON—*C. Robertson.*

AGGRAVATION.—EVIDENCE.—A substantive aggravation, such as house-breaking, may be proved by the evidence of a single witness.

No. 72. Richard Cameron. — Theft, &c.

RICHARD CAMERON, was charged with Theft, aggravated by having been committed by means of house-breaking, and by a person who was habite and repute a thief.

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* James Kennedy, and two others, were cited to appear before the Court this day, on an indictment charging them with 'Falsehood, Fraud, 'and Wilful Imposition, more especially when committed by means of 'using any false or forged writing, knowing the same to be false or 'forged; as also Forgery, as also the wickedly and feloniously using and 'uttering as genuine any forged writing knowing the same to be forged.' The mode in which the crimes were charged to have been committed, was by the pannels having, on six several occasions, procured goods from different tradesmen, by presenting to them written orders, bearing a forged signature. In reference to this, and a similar charge against one Robert Russel, for forging and uttering a certificate of proclamation of banns, the Lord Justice-Clerk announced the opinion of the Court, that such cases might competently be tried before the Sheriff and a jury, and recommended to the Lord Advocate to direct that that mode of trial should in future be adopted.

No. 72. Richard Cameron, Nov. 7 1839.

Theft, &c.

IN SO FAR AS, on the night of the 13th, or morning of the 14th of August 1839, the said Richard Cameron did wickedly and feloniously break into and enter the washing house part of the premises in Torphichen street, in or near Edinburgh, occupied by Miss Isabella Kinloch residing there, by breaking two panes of glass in the window of said washing house, or otherwise to the Prosecutor unknown, and having thus obtained entrance into the said washing-house, he did then and there wickedly and feloniously steal, &c.

The pannel pleaded not guilty, and a proof was led.

One witness only deponed to the fact of the washing house being locked.

C. ROBERTSON, for the pannel, argued, that a substantive aggravation, such as house-breaking, could not be proved by the evidence of one witness. (Case of Conner and Dougharty, Glasgow, September 20 1838. Swinton Vol. II. p. 194.)

THE LORD JUSTICE-CLERK.—To give effect to the argument maintained for the pannel, would just be to hold, that no conviction for house-breaking can take place, unless the person whose premises are broken into, keeps two servants, both of whom are cognizant of their having been locked.

LORD COCKBURN.—There must be some inaccuracy in the report of the case of Conner and Dougharty; because I am pretty confident that I never laid down the law, as to the necessity of having two witnesses to prove the aggravation. My recollection of the details of the case is not very accurate; but what I think I must have said, was, that there was something which made it unsafe to rely on the single witness, *in that particular case*. But at any rate, if I did state the rule in the way ascribed to me, I am glad to have this opportunity of correcting what was certainly an error. I have no doubt that this aggravation may competently be proved by a single witness. Indeed there is no rule liable to so many exceptions and qualifi-

cations, as that whereby it is commonly said that two witnesses are requisite.

No. 72. Richard Cameron, Nov. 7 1839.

Theft, &c.

The Jury found the pannel guilty, as libelled.

In respect of which verdict of Assize, he was sentenced to be transported beyond seas, for the period of seven years.

Present,

Nov. 8 1839.

THE LORD JUSTICE-CLERK,

LORDS MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE—*Lord Advocate Rutherfurd—Innes*

AGAINST

JOHN CRAW and MARY BEE or CRAW.—*Inglis.*

ASSAULT.—UNNATURAL TREATMENT OF AN INFANT.—OBJECTION OF TOO GREAT LATITUDE IN STATING THE TIME OF AN OFFENCE.—1. Two pannels convicted of 'the cruel and unnatural treatment and 'wilful and culpable neglect of an Infant by its parents, or natural 'and legal custodiers, whereby such Infant is injured in its person 'and health,' and sentenced to twelve months imprisonment.

2. A charge of assault on a child of tender years allowed to be stated as having been committed 'at many different times,' during a space of nearly ten months, 'the particular times being to the Prosecutor unknown.'

JOHN CRAW, and MARY BEE or CRAW, his wife, were charged with Assault, especially when committed on a child of tender years, and to the fracture of bones, and grievous injury of the person; as also the Cruel and Unnatural Treatment, and Wilful and Culpable Neglect of

No. 73. John and Mary Craw.

Assault, &c.

No. 73. John and Mary Craw, Nov. 8 1839.

Assault, &c.

an Infant by its Parents, or Natural and Legal Custodiers, whereby such Infant is injured in its person and health;

IN SO FAR AS, at many different times between the 1st of July 1838, and the 17th of April 1839, the particular times being to the Prosecutor unknown, within or near the house then occupied by them at Hermandstone, or Long Herdmandstone, in the parish of Currie, and county of Edinburgh, the said John Craw and Mary Bee or Craw did, both and each, or one or other of them, wickedly and feloniously attack and assault James Craw, now deceased, an infant about two years old, in October 1838, being the son of the said John Craw, by a former marriage, and residing in family with, and under the natural and legal care and charge of both and each of the said John Craw and Mary Bee or Craw, and did, with their fists, or with a stick, or with some other instrument to the Prosecutor unknown, strike and beat him on the head, arms, back, and other parts of his body, and did repeatedly plunge him into a tub or barrel of cold water during the winter season, he being at the time in a delicate state of health; and they did, both and each, or one or other of them, wilfully and culpably, and in breach of their duty as the parents or natural and legal custodiers of the said infant, neglect to afford the said James Craw such usual attention, such wholesome food, clothing, and accommodation, as was necessary to his health, suitable to their condition in life, and within their power, and which it was their bounden duty to have afforded; and the said John Craw and Mary Bee or Craw did, both and each, or one or other of them, in breach of their duty as aforesaid, otherwise cruelly and unnaturally maltreat and abuse the said James Craw; by all which, or part thereof, the said James Craw was grievously injured in his person and health; in particular, his right arm was broken, two of his teeth were struck out, his back and shoulders and other parts of his body were covered with ulcers and sores, aud he was reduced to a miserable and emaciated condition.

INGLIS, for the pannels,—objected to the relevancy of the Indictment. (1.) The second of the two charges in the major proposition, consists partly of an act committed, and partly of a duty neglected. It involves a proposition which is not universally true. It is cruel and unnatural treatment to corrupt the morals of a child, either by precept or example; and this may be accompanied by neglect of its natural wants, or inattention to the quality or quantity of its food, which would be culpable neglect. Yet it cannot be maintained that this would be indictable.

No. 73. John and Mary Craw, Nov. 8 1839. — Assault, &c.

And nothing could be more dangerous than to violate the privacy of families, for the purpose of enforcing by penal sanction the performance of parental duties. (2.) The latitude of nearly ten months, which is assumed in the minor proposition, is not admissible in a charge of Assault; that crime consisting of a specific act, the time of which must be known.

The objections were repelled.

The pannels pleaded not guilty, and a proof was led.

The Jury unanimously found the pannel John Craw not guilty of the assault libelled, and found it not proven against the pannel Mary Bee or Craw, but found both pannels guilty of cruel and unnatural treatment, and wilful and culpable neglect of the child James Craw, as libelled.

In respect of which verdict of Assize, the pannels were sentenced to be imprisoned in the Bridewell of Edinburgh, for the period of twelve calendar months.

Dec. 4 1839.

Present,

THE LORD JUSTICE-CLERK,

LORDS MEADOWBANK, MACKENZIE, MONCREIFF, MEDWYN, COCKBURN.

ALEXANDER MACGREGOR—*Handyside*

AGAINST

BALFOUR and M'CALLUM—*Robertson—Macfarlane.*

SUSPENSION AND LIBERATION.—STATUTE 4TH GEO. IV. c. 34—A Suspension of a judgment under the above statute, against an appren-

No. 74. Macgregor v. Balfour & M'Callum, Dec. 4 1839. Susp. & Lib.

tice who had absconded, on the ground that the term of his Indenture had expired before the judgment was pronounced, refused.

By an Indenture, dated 9th April 1834, the Suspender bound himself as an apprentice to the Respondents, in their trade of cast iron founders in Glasgow, for six years, from and after the 1st of March 1833. The Indenture contained a provision that he should not absent himself from his work without leave, 'excepting in case of 'sickness, and for each day he shall so absent himself, ex- 'cepting as said is, that he shall either pay to his master two 'shillings sterling, or serve him two days for each one there- 'of, at the expiry of this Indenture, in the master's op- 'tion. The Suspender continued in the Respondents' service under this Indenture, (with the exception of some irregularities in attendance), till the 28th June 1838, when he absconded and went to England. On the 8th July 1839, the Respondents, hearing that he was in Glasgow, presented to the Justices of the Peace for the county of Lanark a petition, praying for his apprehension and punishment, in terms of the statute 4th Geo. IV. c. 34, § 1.[1]

John M'Callum, the sole partner of the firm of Balfour and M'Callum, having made oath to the verity of the complaint, warrant was granted for the apprehension of the Suspender; and he having been accordingly brought before one of the Justices on the 12th July 1839, emitted a declaration, confessing, in substance, the whole facts set forth against him. A proof having at the same diet been allowed to both parties, one witness was examined for the Respondents; after which the Justice found 'the 'complaint sufficiently instructed, and that the said Alex- 'ander M'Gregor has committed a breach of the section of 'the statute founded on,' and convicted 'the said Alexander 'M'Gregor of the offence or misdemeanor charged against 'him;' and therefore granted warrant for his committal to the house of correction in Glasgow, there to remain and to be held to hard labour for three months.

[1] See this Section of the Act, *ante*, p. 386, *Note*.

Macgregor having been incarcerated under this sentence, presented a bill of suspension and liberation, on the ground *inter alia*, that the section of the statute founded on in the petition, applies only to the case of an apprentice under a current indenture, and that of the Suspender had expired more than four months before the petition was presented. It was argued, that the inapplicability of the statute founded on to the circumstances of the present case, was proved by the fact, that one of the prescribed modes of punishment was abatement of wages; and that the statute under which the complaint ought properly to have proceeded was the 6th Geo. III. c. 25.[1]

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Susp. & Lib.

The case came to be advised this day.

THE LORD JUSTICE-CLERK.—I cannot say that I am for sustaining the reasons of suspension. It cannot be supposed that the section of the statute founded on entitles a party, by simply keeping out of the way, to evade an act, the object of which is declared to be to *enlarge* the

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[1] By this Act, it is provided, (§ 1.) that if any 'Apprentice shall absent 'himself from his master's service before the term of his apprenticeship 'shall be expired, every such apprentice shall, at any time or times there-'after, whenever he shall be found, be compelled to serve his said master 'for so long a time as he shall have so absented himself from such service, 'unless he shall make satisfaction to his master for the loss he shall have 'sustained by his absence from his service; and so from time to time as 'often as any such apprentice shall, without leave of his master, absent 'himself from his service before the term of his contract shall be fulfilled; 'and in case any such apprentice shall refuse to serve as hereby required, 'or to make such satisfaction to his master, such master may complain 'upon oath, to any justice of the peace of the county or place where he 'shall reside, which oath such justice is hereby empowered to administer, 'and to issue a warrant under his hand and seal for apprehending any 'such apprentice; and such justice, upon hearing the complaint, may 'determine what satisfaction shall be made to such master by such ap-'prentice; and in case such apprentice shall not give security to make 'such satisfaction according to such determination, it shall and may be 'lawful for such justice to commit every such apprentice to the house of 'correction for any time not exceeding three months.'

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powers of Justices in determining complaints between masters and apprentices.

LORD MACKENZIE.—I am of the same opinion. I have great doubts whether it can be properly said that the Suspender's Indenture had expired, as although the six years from the 1st of March 1833 had elapsed before the complaint was presented against him, he had not served the additional days which he is taken bound to serve in consequence of having absented himself. And I am clearly of opinion, that even if the indenture had expired, the section of the statute founded on in the petition, is applicable to the case.

LORD MONCREIFF.—I concur. The first section of the last act contains express reference to the case of an apprentice who 'shall have absconded.' The provision as to the abatement of wages applies to instances of 'misdemeanour, misconduct, or misbehaviour,' on the part of apprentices.

The other Judges expressed their concurrence.

The Court accordingly refused the bill, with expenses.

WOTHERSPOON & MACK, W.S.—C. FISHER, S.S.C.—*Agents.*

PETER GILLIES, Advocator—*M'Neill—Russell*

AGAINST

GEORGE JEFFREY, Respondent—*D. F. Hope.—Buchanan.*

ADVOCATION AND SUSPENSION.—STATUTE 17th GEO. III. c. 56.

1. An advocation and suspension of a judgment of the Justices of the peace, affirmed by the Quarter Sessions, under the above statute, found competent, though the judgment had been obtempered by payment of the penalty imposed.
2. The judgment suspended, partly on the ground, that under the provision of the statute relative to any 'purloined or embezzled materials

'whether mixed or unmixed, wrought or unwrought,' a completely finished article of manufacture is not included.[1]

Gillies v. Jeffrey, Dec. 4 1839.

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On the 6th of July 1836, a vessel called the Vernon, of Liverpool, arrived at the Broomielaw of Glasgow, with a cargo consisting partly of iron rods in bundles. The iron was landed on the 7th, and remained all night under a shed on the quay. On the following day a suspicion arose that some bundles of these iron rods had been stolen, and were then deposited in the premises of the Advocator, a smith in Glasgow. His workshop was searched, and three bundles of iron were found, which he admitted to have come in that morning. But, on a farther investigation of the matter, by the Procurator-fiscal, it was distinctly proved by the master of the Vernon, that the iron in question had never formed part of the cargo of that vessel.

More than three weeks afterwards, namely, on the 3d of August 1836, the Respondent, who was Superintendant of the Gorbals police, presented to the Justices of the peace for Lanarkshire, a petition, under the act 17th Geo. III. c. 56,[2] setting forth, that 'the complainer has good

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[1] It will be observed that the opinions of the Judges proceed also partly on the evidence taken in the case. Of this, however, the report does not pretend to present any record.

[2] By this act, entitled 'an act for amending and rendering more effectual the several laws now in being, for the more effectual preventing 'of frauds and abuses by persons employed in the manufacture of hats, and 'in the woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair, 'and silk manufacture; and also for making provision to prevent frauds 'by journeymen dyers,' it is enacted, § 10. 'that it shall and may be lawful 'for any two Justices of the Peace of any county, riding, division, city, liberty, town or place, upon complaint made to them upon oath, by any 'one credible person, that there is cause to suspect that any such purloined or embezzled materials, whether mixed or unmixed, wrought or unwrought, are concealed in any dwelling-house, out-house, yard, garden, 'or other place or places, to cause every such dwelling-house, out-house, 'yard, garden, or place to be searched in the day-time; and if any such 'materials, suspected to be purloined or embezzled, shall be found therein, 'to cause the same, and the person or persons in whose house, out-house, 'yard, garden, or other place, the same shall be found, to be brought be-

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'cause to suspect that purloined or embezzled iron, in bars, 'rods, or otherwise in a state of manufacturing into nails, 'or other articles made of that material, is concealed or to 'be found in the workshop, warehouse, cellar, or dwelling-'house, occupied by Peter Gillies, smith, residing in Car-'rick Street, in the city of Glasgow, and shire of Lanark,' and praying for a warrant 'to pass to the premises of 'the said Peter Gillies, and to search the same for the 'said purloined or embezzled iron, in bars, rods, or other-'wise in a state of manufacture, and to bring them before 'you, or any two of your number, and also to apprehend the 'said Peter Gillies for examination,' &c. The Respondent having made oath to the truth of the statement contained in this application, the Justices granted the warrant as craved. A search was accordingly made on the following day, (4th August) when a chain cable was found in the Advocator's premises. This the officers seized, and also apprehended the Advocator, and brought him before the Justices. The Respondent now lodged a minute in the following terms, 'The complainer begs leave to condescend 'upon the following article of iron seized in the premises 'of the said Peter Gillies, in virtue of your Honours' war-'rant, dated the 3d day of August current, under the act '17 Geo. III. cap. 56, viz. 70 yards or thereby of iron 'cable, made from materials of that article, which the com-'plainer charges the said Peter Gillies with receiving, 'knowing the same to have been purloined or embezzled, 'or at least to have received the same from some person or 'persons not duly authorized or entitled to dispose there-'of.'

'fore any two Justices of the Peace for the same county, riding, division, 'city, liberty, town or place; and if the said person or persons shall 'not give an account to the satisfaction of such Justices, how he, she, 'or they, came by the same, then the person or persons so offending 'shall be deemed and adjudged guilty of a misdemeanour, and shall be 'punished in manner herein after mentioned, although no proof shall 'be given to whom such materials belong.'

The Advocator emitted a declaration, in which he stated, that the whole of the materials of which the chain cable was made, 'were purchased from Mr. Thomas Cuth-'bertson, iron merchant in Glasgow, with the exception 'of three bundles, weighing something short of two 'hundred weight,' that he 'got these three bundles in the 'name of a Mr. Boyd,' that he paid L.1 for them, being at the rate of 10s. 6d. per cwt., that he 'did not purchase 'the said three bundles of iron from Mr. Boyd himself, but 'he purchased the same from a person whom the declarant 'took to be Mr. Boyd's porter, and who told the declarant, 'on his asking where the said bundles had come from, 'that Mr. Boyd had purchased the same from a ship mas-'ter, being an overplus or a remainder of his cargo; that 'the declarant got a receipt, (which he produced) from 'Mr. Boyd on the 6th of July, the date thereof, when he 'paid the money.' A proof was allowed to both parties, upon advising which, the following judgment was pronounced by the Justices.

'Be it remembered, that on the 9th day of February, 'in the year of our Lord 1838, Peter Gillies, smith, resid-'ing in Carrick Street, in the city of Glasgow, and shire 'of Lanark, was convicted before us, James Martin and 'James Browne, Esquires, two of Her Majesty's Justices 'of the Peace in and for the said county of Lanark, on 'the information of George Jeffrey, residing in Lauriston, 'of a misdemeanour, in so far as the said Peter Gillies had 'in his possession, in his premises in Carrick Street, in the 'city of Glasgow aforesaid, in the month of August 1836, 'three bundles of new iron, but a little rusted, weighing 'something short of 2 cwt. which he alleged he had got in 'the name of a John Boyd, and which iron, as the said 'Peter Gillies has admitted, composed part of the 70 yards 'or thereby of iron cable, seized in the said premises of 'the said Peter Gillies, and brought to the office of the 'clerk of the peace of the said county, where it still is, in 'virtue of a warrant of the Justices of peace of the said 'county, granted on the said information of the said George

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'Jeffrey, and dated the 3d day of August 1836; and which 'three bundles of iron of the weight aforesaid, and com- 'posing part of the said cable, as aforesaid, the said Peter 'Gillies so had in his possession as aforesaid, being pur- 'loined or embezzled, and not producing the party or par- 'ties being duly entitled to dispose of the same, of whom 'he bought or received the same, nor giving a satisfactory 'account how he came by the same, contrary to the act '7th Geo. III. chap. 56.' Therefore, the Justices found that the Advocator had forfeited L.20, it being a first offence, one moiety to be paid to the informer, and the other to certain charitable societies in Glasgow.

The Advocator appealed to the Quarter Sessions, where the judgment of the Justices was affirmed. He thereafter paid the sum adjuged to have been forfeited by him; and presented a bill of advocation and suspension, on the following grounds:

(1.) The subject matter of the prosecution and conviction, did not fall under the act of Parliament, in respect that the charge, as ultimately moulded by the informer, and the conviction are founded on the Advocator having been in possession, not of "*materials*" of any kind, but of a *manufactured article.* The object of the statute was to check the frauds and embezzlements committed by workmen entrusted with materials to be wrought up by them into manufactured articles. And the description of the goods to which it refers, as 'any such purloined or embezzled materials, *whether mixed or unmixed, wrought or unwrought,*" has reference to the condition in which the materials are purloined or embezzled, and has no application to an article which the accused himself has subsequently manufactured, either entirely out of these materials, or partly out of them, and partly out of other materials, his acquisition of which is not exposed to the slightest shade of suspicion, This view is confirmed by other provisions of the statute. Thus, the third section deals with persons who shall buy, receive, &c. 'from any

'person or persons whatsoever, any of the said materials, 'whether the same be, or be not, first wrought, made up, 'or manufactured, knowing the same to be so purloined or 'embezzled.' Here, the being wrought or unwrought is a quality of the materials at the time of being purloined or embezzled; and, according to all received rules of construction, the same words must have the same meaning in other parts of the statute, unless it can be shewn that, in the other parts, a different signification is clearly and inevitably imposed upon them. Again, the 13th section enacts, that, when any person shall have been convicted under the 10th section, the Justices shall direct 'the ma-'terials' to be deposited with the church-wardens or overseers of the poor—that certain notices shall be given, in order to bring forward the owner—and that, if the materials are not claimed within thirty days, they shall be sold, and the proceeds paid over, like the penalty, one half to the informer, and the other to charities. All this is perfectly intelligible in regard to materials which are purloined or embezzled, either in a mixed or unmixed state, either wrought or unwrought. But it becomes altogether inextricable when applied to manufactured articles, made by the accused, even out of materials which he may have improperly and incautiously received, and still more, if the materials so received form only a part, and it may be a very insignificant part, of the manufactured article.

(2.) This erroneous idea, as to the subject matter of the prosecution, has led to irregularities in the course of it, which, of themselves, would vitiate the proceedings. The Respondent's averment in the petition was, that the iron, if not still in its original form of bars or rods, had not become, at least, a manufactured article, but was only in the course of being manufactured. The warrant granted by the Justices, in like manner, was to search for 'the pur-'loined *materials* of iron in bars, rods, *or other materials*.' None of these expressions could justify the seizing a manufactured iron article. Again, the new charge contained in the minute lodged by the Respondent—while it might

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have been admissible under the 6th section of the statute, which deals with persons 'receiving such materials as 'aforesaid, knowing the same to have been either pur- 'loined or embezzled'—was wholly incompetent under the 10th section, which alone was founded on. Present possession alone is what the statute requires. But the conviction merely finds that the Advocator had the three bundles of new iron in his possession, '*in the month of August* 1836,' which, besides being too vague, is contrary to the evidence, as it was proved that before the 3d of August, when the search warrant was granted, the iron had been manufactured into a cable.

(3.) On the merits, the conviction is unsupported by, and contrary to the evidence. That conviction finds, in regard to the three bundles of new iron, 1st, that the Advocator 'so had them in his possession as aforesaid, being 'purloined or embezzled;' and, 2d, that he neither produced the party duly authorised to dispose of the same from whom he bought them, nor gave a satisfactory account how he came by them. The first of these findings clearly shews that the informer and the Justices had some hazy and hankering notion, that the bundles of iron in question had been stolen from the cargo of the Vernon. But this was distinctly proved not to be the case; and there is not even a suggestion or suspicion of iron having been stolen from any other quarter. As to the second finding, the Advocator proved, by the evidence both of Cuthbertson and Boyd, the persons from whom he originally stated that he had obtained the iron of which the cable was made, that the account he had given of the matter was true.

The Respondent pleaded, that the present advocation was incompetent, in respect that the Advocator had actually obtempered the sentence complained of; and answered,—

(1.) The objects and import of the various statutes on this subject was to impose the penalty on the suspected possession of materials, whether in that shape or in the

manufactured shape. Thus, the 13th George II., after reciting the terms of the 1st of Queen Anne, c. 18, proceeds in the preamble to state that ' doubts have arisen' whether the provisions of it ' extend to the embezzling woollen, ' linen, fustian, cotton, and iron manufactures *actually* ' *wrought or made up into merchantable wares*,' and it thereupon proceeds to enact that the penalties of the act of Queen Anne shall be applicable to any embezzlement of the materials referred to, ' whether the same, or any part ' thereof, *be or be not first wrought, made up, or manu-* ' *factured*.' These acts are fully recited in the statute 22 Geo. II., which bears to be an act for the more effectually preventing frauds and abuses by persons employed in manufactures and other purposes, and after stating that the penalties exacted by the former statutes had not been sufficient to deter persons from committing the offences thereby intended to be prevented, it proceeds to enact new and severer penalties, applying these to the case of any person ' purloining, secreting, embezzling, selling, ' pawning, exchanging, or otherwise unlawfully disposing ' of any of the materials with which he, she, or they, shall ' be respectively entrusted, whether the same, or any part ' thereof, *be or be not first wrought, made up, manu-* ' *factured, or converted into merchantable wares*.' The act 17th Geo. III. c. 56, is founded on the previous statutes, and particularly on the last mentioned act of the 22d Geo. II.; and it throughout describes the articles to which it relates, as ' any such purloined or embezzled ma- ' terials, *whether mixed or unmixed, wrought or un-* ' *wrought*.'

(2.) A complaint, under this statute, is founded on *suspicion* of what may be *concealed* in a party's premises. The informer cannot, therefore, describe the *corpus delicti* with the precision and accuracy which belongs to knowledge, and far less can he foresee the shape into which the imputed articles may be wrought up, or manufactured, before they are actually seized under the judicial warrant. In the present case, the Respondent described the articles

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which he had cause to suspect to be concealed in the Advocator's premises, generally as iron in rods, or bars, or otherwise in a state of manufacturing into nails, *or other articles made of iron*, and that description, agreeably to the terms of the statute, comprehended both the unwrought material, and every possible article into which it could be manufactured. Nor was there any variance between the minute lodged for the Respondent and the complaint, the latter being so framed as fully to cover and include the *corpus delicti* specified in the former. Indeed it must be obvious, that until the thing *concealed* was brought to light, and the *suspicion* converted into knowledge, it was impossible to do more than give a general description of the suspected article, which description, however, labours under no discrepancy with the statement in the complaint, but is a mere specification of what is there averred generally.

(3.) As to the merits, there is not a single word either in the complaint or conviction regarding the Vernon, or any iron belonging to, or stolen from that vessel. All that the statute required the Respondent to do, was simply to state his suspicion upon oath, and to bring the suspected person and articles before the Justices. It then became the business and duty of that person to justify his conduct, by giving an account to the satisfaction of the Justices how he came by the suspected articles. The Advocator failed to satisfy the Justices on this essential point. And their judgment was well founded, as there were important discrepancies between his statement and the evidence of Boyd, from whom he alleged that he had bought the iron in question.

The case came to be advised this day.

LORD MEADOWBANK.—There appears to me to be no evidence that the iron of which this chain cable was manufactured had been stolen. The oath of the Respondent seems to have been emitted under a suspicion that it was

part of the iron which had been lost from the Vernon. But this is distinctly disproved. Then, if it is to be held that the party was nevertheless bound to account satisfactorily for the way in which *other iron* came into his possession, I think he has done so.

LORD MACKENZIE.—I shall be glad if the rest of the Court concur with the opinion just delivered; but I own I should have great difficulty in doing so. I was at first doubtful whether advocation and suspension was competent, seeing the party had obtempered the judgment by paying the fine. But I am inclined to get over this, (though not without difficulty,) because we now exclude reduction, and also because the advocation was brought immediately. The question then comes to be, can we reverse the judgment of the Justices? I see no evidence of the Advocator having stolen the iron in question. But that is not the charge. The Respondent, on making oath that he *suspected* embezzled materials to be concealed in his premises, was entitled to get a search warrant. A search was made, and a certain portion of iron was found in the shape of a chain cable; and it is admitted that that cable had been made, subsequently to the materials having been traced into the Advocator's shop. Now the statute provides, that if a party in this situation does not account to the satisfaction of the Justices for the manner in which he came by the articles, he shall be held guilty of a misdemeanour. The Advocator gave an account, with which the Justices were not satisfied. If I thought they ought to have been so, I would have reversed their judgment. But as this is not the case, I am of opinion that it should be sustained.

LORD MONCREIFF.—I am of the opinion expressed by Lord Meadowbank. I thought from the first that the proceedings here arose out of a hard construction of the statute, and one which would often involve the most honest traders in circumstances of apparent delinquency. I am quite clear that what was in contemplation, though it is not libelled, was, that the iron in the Advocator's pos-

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session, was that which had been stolen from the Vernon. Now it was distinctly proved that the chain cable, which alone was found in his premises, was not made of Vernon iron. Then, if I am to go into the other point, I think the Advocator gave a reasonable account, and one which ought to have satisfied the Justices, of the mode in which the iron in question came into his possession.

LORD MEDWYN.—I agree with Lord Mackenzie. It seems to me to be of no importance, though it were proved that no iron was stolen from the Vernon; because, in investigating one offence, another may be discovered. It is said to be a hard construction of the statute to compel a dealer to account for the way in which materials came into his possession. I do not think so. The Advocator did not think so; he gave an account which, if it had not been contradicted, would have been sufficient to exculpate him. But his statement appears to me to be contradicted by the evidence of Boyd.

LORD COCKBURN.—I concur with Lord Meadowbank and Lord Moncreiff. I think, in the first place, that so far as the Advocator was bound to account for the way in which he came by the iron, he has done so. But, secondly, even if I thought otherwise, I do not think that the statute applies. It refers only to 'purloined and embezzled *materials*,' and directs, that if 'any such materials' shall be found in the house of the party complained against, 'the same' shall be brought before the Justices. Now, nothing to which I can apply the word '*material*,' was found in the Advocator's possession. A finished chain cable was found. I cannot apply the word 'material,' to the body of a completely finished article. If the interpretation of the statute contended for by the Respondent be correct, he might have gone into another shop in search of moleskins, and seized a hat. It appears to me that the moment the material becomes a completed article, the obligation to account for the material ceases.

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The LORD JUSTICE-CLERK.—I concur with the majority of the Court, and especially with Lord Cockburn. The principle on which the judgment of the Justices proceeded would place the most honest dealer in dangerous circumstances. How is it possible for the manufacturer of a cable of great length, to account for every portion of iron employed in its construction? I think we cannot safely entertain even a suspicion that the iron in question is that which was stolen from the Vernon. After this being ascertained, the Informer takes hold of this clause of the statute, and insists on the Advocator accounting for the materials of seventy yards of cable. I am of opinion that he has given as satisfactory an account of the matter as could have been expected from the most respectable dealer. I am glad, therefore, that the judgment against him will be set aside.

The Court accordingly sustained the reasons of Suspension, and found the Advocator entitled to his expenses in both Courts.

WOTHERSPOON & MACK, W.S.—JOHN CULLEN, W.S.—*Agents.*

HER MAJESTY'S ADVOCATE, Complainer—*Lord Advocate Rutherfurd—Handyside.*

AGAINST

ALEXANDER GALLOWAY, Respondent—*Robertson—M'Neill.*

PETITION AND COMPLAINT.—The cashier of a country bank, who, after being cited to appear as a witness before the Sheriff-substitute of the county, and produce a bill suspected to be forged, gave up the bill to a third party, on payment of its contents, found guilty, on a petition and complaint at the instance of the Lord Advocate, of illegally obstructing the administration of justice, and fined in the sum of L.100.

A PETITION and Complaint was presented to the Court, at the instance of Her Majesty's Advocate, against the Re-

No. 76. The Lord Advocate v. Alexander Galloway, Dec. 4 1839.

spondent, who was agent or cashier for the Western Bank at Airdrie.

Petition & Comp.

The petition set forth the following facts :—

On the 10th of April 1839, a petition was presented to the honourable the Sheriff of Lanarkshire, or his Substitutes, at the instance of Thomas Dykes, writer in Hamilton, Procurator-fiscal of court for the public interest, which set forth, that the petitioner had received information that James Anderson, farmer in Bellshill, having, upon or about the 27th day of November 1838, written out, or caused to be written out, a bill of the foresaid date, for L.22. 11s. or thereby, payable four months after date, signed by the said James Anderson, as drawer, and addressed to Robert Brownlee, farmer in West Bellshill, the said James Anderson did, within his house at Bellshill, or at some other place in the county of Lanark to the petitioner unknown, upon or about the date of the foresaid bill, wickedly and feloniously forge the name 'Robert Brownlee,' to the said bill as acceptor thereof, with intent that the same should pass as the genuine signature of Robert Brownlee, before designed; and the said acceptor's name having been so forged to the said bill, the said James Anderson did, time above mentioned, within the Western Bank Office at Airdrie, parish of New Monkland, and county of Lanark, wickedly and feloniously utter the said bill as the genuine accepted bill of Robert Brownlee, before designed, and that by tendering the same to Alexander Galloway, Esq. agent for the said bank at Airdrie, or to some other person in the said bank acting for him, and obtain the amount foresaid in bank or banker's notes for the said bill, under deduction of the discount payable for the same. The petitioner therefore prayed for warrant to search for, and apprehend the said James Anderson, wherever he can be found, within the shire of Lanark, and to bring him for examination; and thereafter for warrant to imprison him within the tolbooth of Hamilton, or other legal jail, to be detained for farther examination, or till liberated in due

course of law; farther, for warrant to search the person, repositories, and domicile of the said delinquent, and the house in which he may be found; and to secure, for the purposes of precognition, all articles found therein, importing guilt or participation in the crime foresaid; and also to apprehend and bring for examination the person in whose possession or premises such articles may be found; and to cite all persons likely to have knowledge of the premises, in order to be precognosced thereanent.

Of the same date, the Sheriff-substitute granted warrant as craved. James Anderson, the accused party, having thereupon been apprehended and brought before the Sheriff-substitute for examination, of this date, (April 11th 1839), emitted a judicial declaration, and thereafter warrant was granted to imprison him in the tolbooth of Hamilton for farther examination.

From the declaration emitted by the prisoner, and precognition of witnesses, it appeared that the bill alleged to be forged was in the custody or possession of the said Alexander Galloway mentioned in the petition. The Procurator-fiscal, under the authority of the Sheriff, and the warrant granted in terms of the prayer of the petition, accordingly directed William Brownlee, Sheriff-officer, to proceed to Airdrie to cite the said Alexander Galloway, to be examined as a witness in precognition, and to bring with him, exhibit, and produce the bill referred to in the petition, and therein described. The Sheriff-officer accordingly proceeded to Airdrie to the bank office of the said Alexander Galloway. He was told that Mr. Galloway was from home, but was expected to return that night. The officer left a written citation to be delivered to Mr. Galloway as soon as he returned home.

The citation so left was in the following terms:—

'Alexander Galloway, Esq. banker in Airdrie, you are hereby summoned to appear before the Sheriff-Substitute of Lanarkshire, within the New Court-Hall of Hamilton, upon the 12th day of April current,

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'at nine o'clock forenoon, to be examined as a witness upon oath for 'Thomas Dykes, writer in Hamilton, procurator-fiscal of court for the 'public interest, against James Anderson, West Bellshill, and to bring 'with you, exhibit, and produce, a bill dated 27th November 1838, 'drawn by the said James Anderson upon, and accepted by, Robert 'Brownlee, farmer, Bellshill, for L.22. 11s., and payable four months after 'date, and that under the penalty of one hundred merks Scots, with 'certification.

'11th April 1839.

(Signed) WILL. BROWNLEE, *Sheriff-officer.*'

The citation was duly received by Mr. Galloway the same evening, on his return to Airdrie. He was then in possession of the bill described in the citation. And he was also aware that the bill had in his own presence, on two previous occasions, been challenged as forged by the alleged acceptor thereof, and also by a nephew of the alleged acceptor, to whom Mr. Galloway had himself exhibited it, to obtain his opinion whether the signature was genuine or not. Farther, he was aware that James Anderson was in custody on the charge of forging the said bill.

Mr. Galloway did not attend in terms of his citation to be examined as a witness. In an after part of the same day, he made his appearance, and admitted in his examination, that he had that morning delivered up the bill to two persons of the name of Anderson, relations of the accused, upon receiving payment of its contents.

The following is the declaration emitted by Mr. Galloway before the Sheriff-substitute:—

'*Hamilton, 12th April* 1839.—Alexander Galloway, declares, That 'he is cashier at Ardrie for the Western Bank of Scotland. Declares, 'That on his return from Edinburgh last night, he found a citation to ap-'pear here as a witness at nine o'clock this morning; and which citation 'is now produced and docqueted, and subscribed by declarant and the 'sheriff-substitute as relative hereto. Declares, that the bill mentioned 'in the citation was in his hands as cashier at the time he received the 'said citation; and being desired to produce the bill, declares, That it 'is not in his possession now: That John Anderson, farmer, Barby-

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'beith, near Glasgow, and William Anderson, brother of James Anderson, complained upon, called upon declarant between 7 and 8 o'clock 'last night, and offered to pay the bill, which the declarant refused to 'accept of; and his reason for not accepting payment was, that there 'were other bills in the bank drawn and endorsed by the said James 'Anderson; and declarant refused to accept payment of the bill in 'question, unless the other bills were paid at the same time, on which 'they said, they would go and consult with their friends. They re-'turned this morning at half past 9 o'clock, and then paid the whole of 'the bills for which Anderson was responsible, with one exception, and 'that bill was a good one, and they were given up, including the bill in 'question, to Mr. Anderson of Barby Beith. Interrogated, and desired 'to say why he parted with the bill in question, after having been call-'ed upon by a warrant of the Sheriff to produce it, on an application 'of the Procurator-fiscal? declares, That he thought the money would 'be lost to the bank, if he refused to give up the bill when payment was 'offered. Interrogated, Why he did not consider himself bound to de-'liver up the bill in question when payment was offered the night be-'fore? declares, The declarant had not an opportunity of consulting 'his legal adviser at the time, which he did, previous to delivering up 'the bills next morning; and he was told by him, that he had no right 'to withhold the bill when payment was offered. At this time the de-'clarant had heard that James Anderson, complained upon, was accused 'of having forged the acceptor's name on the bill in question. The 'declarant was not told what were the motives which induced the 'Andersons to retire the bills, but he might perhaps suspect them. The 'declarant thinks he could give a correct description of the bill in 'question from the bank books. Interrogated, Whether the said bill 'was, about the date of it, paid over to him in his banking-office in 'Airdrie, for value, and whether James Anderson delivered it there 'personally? declares, That part of the roup bills then brought by 'Anderson to his office were discounted, and part of them assigned 'over as a guarantee for payment of those that were discounted; and 'he cannot at present say, in which of these situations the bill in ques-'tion was, without reference to the books. The said bill was given 'by Anderson, and received by the declarant as bearing the genuine 'subscription of Robert Brownlee, farmer, West Bellshill, as acceptor; 'and his, the declarant's, impression is, that it was Brownlee's genuine 'subscription, as, when Brownlee called at his bank office, on the subject, 'he refused to write his name on a piece of paper, so as to allow de-'clarant to compare the signatures. And being desired to explain why 'he did not, in terms of the citation given to him, appear before the 'Sheriff this morning at nine o'clock, instead of appearing betwixt two 'and three in the afternoon, as he has done, declares, that he con-'sidered that it was a mistake in the officer fixing such an early hour;

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'and that he could not, without making a sacrifice of his other business, appear at such an early hour. He cannot say where the bill in question now is; for, as already mentioned, he gave it up to Mr. Anderson, Barby Beith, this morning; and it was betwixt 11 and 12 when he did so; and it was Anderson and the brother of James Anderson complained upon, by whom he was prevented coming to Hamilton so early as he intended. All which he declares to be truth.'

(Signed) 'ALEX. GALLOWAY.'

The persons named John and William Andersons deny all knowledge of the bill which Mr. Galloway states he delivered up to them. It must be suspected that it has been put out of the way by them for obvious reasons.

The petition stated further that it was unnecessary to make any comments on the conduct of Mr. Galloway. The facts speak sufficiently as to his motives. But the effect of his conduct will probably be, that a prosecution of the accused, who stands committed till liberated in due course of law, for the crime of forgery, as charged against him, must fail, from the difficulty of proving the *corpus delicti*.

The court were therefore prayed to grant warrant for serving the petition, and the deliverance thereon, upon the said Alexander Galloway, and to ordain him to put in answers thereto, if he any has, within a limited time: And further, to ordain him to appear personally at the bar, at a diet to be fixed for that purpose; and thereafter, on considering the petition, with or without answers, and having heard the said Alexander Galloway, to find that the said Alexander Galloway has been guilty of an illegal act in obstructing the administration of justice, and to fine and imprison, or otherwise censure the said Alexander Galloway therefor; and further, to find him liable in the expenses of the complaint, and procedure thereon; or otherwise to pronounce such other order, and dispose of this petition in such way as to their Lordships should seem meet.

Answers to the following effect were lodged for Galloway:—

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The Respondent felt extremely distressed when a petition and complaint before the Supreme Criminal Court, accusing him generally of a flagrant attempt to obstruct the course of justice, was served upon him at the instance of the Public prosecutor. That petition prays to have him brought to the bar, to be fined, imprisoned, and otherwise censured for conduct most unbecoming a party in his position. This certainly is no light matter; but he is humbly advised that there are no grounds for the complaint, and he feels conscious that he did nothing excepting what a due regard to the interest of the establishment under his management absolutely required. If unfortunately he has erred, while acting under advice which may not be considered sound, or done any thing contrary to law, he has to express his sincere regret that he should be placed in such a predicament. A very short explanation of the circumstances will, however, it is hoped, satisfy the Court that he is not to blame.

On the 27th of November 1838, a bill for the sum of L.22. 11s. drawn by James Anderson, farmer in Bellshill, upon and accepted by Robert Brownlee, farmer in West Bellshill, and payable four months after date, was discounted at the office of the Western Bank at Airdrie. This bill, together with many others drawn and indorsed by the said James Anderson, amounting to about L.200, lay at the bank dishonoured. John Anderson uncle, and William Anderson, brother of James, made application with respect to these bills late in the evening of the 11th of April, and offered to pay the one for L.22. 11s. already mentioned. There had been left on that day at the bank a citation for the Respondent, who had been from home, to appear at Hamilton on the 12th, at nine o'clock in the morning, to be examined as a witness, at the instance of the Procurator Fiscal, against James Anderson, and to bring with him the bill. This citation to go to Hamilton, a distance of nine miles, at so

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early an hour, was certainly somewhat unusual, and the Respondent being aware that William Brownlee, the Sheriff officer who signed the execution, was a nephew of Robert Brownlee, the acceptor of the bill, did not think the circumstance the less extraordinary on that account.

On the morning of the 12th, John and William Anderson returned and took up the whole of the bills due by James, with the exception of one which was quite good. The Respondent had, in the mean time, consulted his professional advisers, as to whether he was entitled to keep back the bills, or any of them, on the money being tendered. He was told that, as there was no warrant even applied for by the Procurator-fiscal for obtaining immediate possession of the bill, and no demand made upon him personally for delivery of it, he was not in safety to refuse payment. The mere citation by Brownlee, even if it had been plainly authorized, and by an officer wholly unconnected with the parties, could not, it is submitted, have justified the Respondent in making any allegation of forgery, on the one hand, or in refusing to take payment of the bills due to the bank, on the other;—thereby exposing his constituents to the risk of losing the money, and himself to the chance of an action of damages. He had no reason to believe that Brownlee's name had been forged, more especially as that individual, when he called at the bank, had refused to write his name to be compared with the subscription at the bill. It was under these circumtances that the money was received on behalf of the bank, and the bill given up.

There had been a roup of James Anderson's effects, at which Brownlee had been a purchaser, and his name is entered in the roup-roll for two several purchases, amounting together precisely to the sum stated in the bill. The Respondent has every reason to believe that this bill was a genuine acceptance, and that the whole statement as to the forgery was got up by Brownlee, for the purpose of evading payment of a just debt. But however this may

be, he parted with it upon payment of the amount, and he never imagined that in so doing he was in the least degree impeding the course of public justice, or committing any illegal act. It is not pretended that he was in any way in collision either with John and William Anderson, or with James Anderson, against whom it now appears that the charge of forgery had been preferred, in the application to the Sheriff on the 10th of April. He had no interest in the matter at all, and the citation left at the bank on the 11th, was, according to the advice received by him, no legal bar to the delivery of the bill, and gave him, as he was positively assured, no right to refuse payment of the amount when tendered.

If the Public prosecutor had imagined that there was any point of dittay against the Respondent, he would no doubt have proceeded against him by indictment in the usual form. But there being plainly none, this complaint, a proceeding out of the ordinary course, has been served. It is not even alleged as distinct matter of charge in the petition, that the bill was a forgery, but only that it had been so stated in the application against Anderson. The terms of that application, of the citation, and of the Respondent's declaration as in a precognition, form the whole sum and substance of the present complaint. It is stated that the effect of the Respondent's conduct will probably be, that the prosecution against the accused must fail. But it is not stated, in point of fact, either that the bill was forged, or, far less, that the Respondent knew that it was a forgery, or had the slightest interest to screen the guilty party from justice.

The Respondent, therefore, in the *first place*, is advised that there is reason to doubt the competency of this proceeding, in respect that nothing is charged to have been done by him to interrupt the course of justice by the destruction of evidence, so as to screen an accused party either indicted or alleged in the present complaint to have been actually guilty, and by any collusion with that party.

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He finds no authority in support of a complaint on such meagre grounds as the present.

But, *secondly*, and on the merits, he submits that he was not interpelled from delivering up the bill,—that he had no grounds for believing it to be a forgery, or for resisting delivery of it on payment,—and that, considering the whole circumstances attending the citation, and seeing the connection of the officer from whom it proceeded with the party to the bill, he could not have acted otherwise, with a due regard to the interest of his employers, than he actually did. He therefore submits, that he is not liable in any degree to be censured by the Court, and trusts that no farther step will be taken under the present complaint.

It is, on the one hand, undoubtedly important to check all undue interference with the proper administration of the course of justice; but, on the other, it is respectfully submitted, that, unless there be strong grounds for the interposition of the authority of this High Court, it is not desirable to support applications out of the ordinary course of the common law. It would be cruel in the extreme, where there has been no positive crime or gross immorality committed, to expose a private individual to censure or punishment here; and he feels that, to be brought up to the bar of this Supreme Court—whose jurisdiction, unless there be an immediate demand for interposition, is usually confined to those graver affairs requiring the most solemn method of adjudication and severe punishment—is in itself a proceeding not lightly to be sustained. The Respondent therefore, trusts that the Public prosecutor may see cause to insist no further in this complaint, and that, at all events, the Court, even should they think, as it is hoped they will not, that there is here matter competent and fitting for their cognisance, will hold that the Respondent has been sufficiently punished for any indiscretion in the matter, by having even his name in this form brought under the notice of this High Court. He

has only to repeat, that he did not act intentionally in such a way as to expose himself to censure, and far less from any sinister motive, or in concert with any party suspected or accused. He respectfully throws himself therefore on the consideration of the Court, and will bow as becomes him, to any opinion which may be expressed, —resolved, should any similar event again occur, to regulate his conduct in entire conformity to what may be pronounced as most fitting in itself, and consonant to the strict rule of law and the ends of justice.

The case came to be advised this day.

LORD MEADOWBANK.—If the bill referred to was a forgery, upon whom would the loss have fallen?

M'NEILL.—The Respondent, as agent and cashier of the bank, would have been liable for a part of the loss. What he did was partly for his own interest, but also partly in the discharge of his duty to the bank.

The LORD JUSTICE-CLERK.—There is not the slightest doubt of the relevancy and competency of this complaint. Any one who interferes 'to destroy, suppress, or 'alter evidence of any kind,' may, as laid down by Baron Hume, (Vol. I. p. 384,) 'be summarily punished with fine 'or imprisonment. . . . and this either on a com-'plaint to the Court, or on the knowledge and *ex proprio* '*motu* of the Court themselves.' And as to the present case, I am sorry to say that I cannot think that the explanation which the Respondent gives, is at all satisfactory. If he received advice to act as he did, it was bad advice. Our duty is clear to sustain this complaint; at the same time, I do not think that the punishment which we impose ought to include actual imprisonment.

LORD MEADOWBANK.—This petition and complaint is undoubtedly the proper mode of bringing such a case before us. I shall concur in whatever sentence is proposed as adequate to the offence.

LORD MACKENZIE.—I concur as to the competency of

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this proceeding. I firmly believe, that what the Respondent did was not done with any malignant desire to defeat the ends of justice. But it was done for the purpose of keeping money in his own pocket, even although his doing so impeded justice. The case does not differ very widely from what it would have been, if the relatives of the accused had given him a purse of money to induce him to destroy the evidence against him.

LORD MONCREIFF.—There is no doubt of the competency of the complaint. The party was regularly cited to appear as a witness and exhibit the bill in question. He admits that he suspected it to be forged; and he had real evidence of its being so, in the fact of its being paid by two men, whose names were not on it, but who were relations of the drawer. I cannot acquit him of assenting to the object of these men. The effect of his conduct in defeating justice has been very great; and he has himself obtained the benefit of it.

LORD MEDWYN.—I entirely concur. I should have liked the case much better if the Respondent had given up the bill to the Andersons at once. But, in his very candid declaration, he admits that he refused to do so, unless all the other bills in the bank, for which James Anderson was responsible, were also paid. Then the Andersons promise to return next morning; and it is this which prevents the Respondent from going to Hamilton at the hour for which he was cited.

LORD COCKBURN.—The case of Dun, (March 11th 1793. Hume, vol. I. p. 384), settles the point of competency. But I rest my opinion entirely on that case; because, but for it, I should have thought our proceeding to a summary trial of this matter incompetent. This man has, I think, been guilty of a very serious crime, for which I should, but for the case of Dun, have been of opinion, that he ought to be regularly brought to trial before a jury. The only exception to the general rule, in such matters, is where the crime resolves into contempt of Court. And my surprise is, that the Sheriff did not pu-

nish the Respondent on the spot, both by sending him to jail, and by imposing a heavy fine. But since this has not been done, and since Dun's case establishes that we may proceed here without a jury, I must say that my opinion of the case is very decided. I do not think the Respondent's offence would have been greater, if he had accepted L.200 from the friends of the accused to destroy the bill.

The Court accordingly sustained the complaint, and in respect it was stated that the Respondent was in town, ordered him to appear at the Bar forthwith.

GALLOWAY having appeared accordingly,

M'NEILL stated that he had nothing further to urge, except to repeat, that in what he had done he had not acted with any intention to defeat the ends of justice.

The Court, in the Respondent's presence, found that he had been guilty of illegally obstructing the administration of justice, and therefore fined and amerciated him in the sum of L.100 sterling, payable to the proper officer in Exchequer, for her Majesty's use; and ordained him to be carried to, and detained in the tolbooth of Edinburgh, till the said fine be paid.

No expenses were awarded to the Crown.

D. CLEGHORN, W.S.—GRAHAM & ANDERSON, W.S.—*Agents.*

HER MAJESTY'S ADVOCATE.—*Lord Advocate Rutherfurd—Handyside.*

AGAINST

WILLIAM BROWN.—*Hall Maxwell.*

FORGERY.—A messenger-at-arms, who pleaded guilty to three acts of forging the names of individuals, as witnesses to executions, sentenced to six months imprisonment.

No. 77. William Brown, Dec. 4 1839.

Forgery.

WILLIAM BROWN, Messenger-at-arms and Sheriff officer, was brought before the Court at the Glasgow Autumn Circuit, charged with three distinct acts of Forgery, more particularly the feloniously Forging and Counterfeiting of the Subscription of a Witness or pretended Witness to an execution of charge or other execution made up and returned in name and under the hand of a messenger-at-arms; AS ALSO, the feloniously Using and Uttering as genuine any execution of charge or other execution in name and under the hand of a messenger-at-arms, having adhibited any forged or counterfeited subscription of a witness or pretended witness thereto, knowing the same to be forged or counterfeited.

The pannel pleaded guilty.

HALL MAXWELL, in mitigation of punishment, stated that it was a common practice for messengers-at-arms to put down as witnesses to executions, the names of parties who were present, but did not sign the instrument.

The LORD JUSTICE-CLERK and LORD MONCREIFF certified the case to the Hight Court of Justiciary. It came to be advised this day.

In respect of his judical confession, the pannel was sentenced to be imprisoned, in the jail of Edinburgh, for the period of six calendar months.

Jan. 22
1840.

Present,

THE LORD JUSTICE-GENERAL.

THE LORD JUSTICE-CLERK.

LORDS MEADOWBANK, MACKENZIE, MONCREIFF, MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Ivory—Crauford.*

AGAINST

GEORGE JEFFREY.—*Robertson—Semple.*

EXTORTION AND OPPRESSION.—A Superintendant of Police, who pleaded guilty to six charges of extorting money from individuals, by instituting or threatening prosecutions against them under the Act 17th Geo. III. c. 56, and afterwards privately abandoning the proceedings, sentenced to nine months imprisonment.

No. 78. George Jeffrey.

Extortion and Oppression.

GEORGE JEFFREY, lately superintendant of the Gorbals Police establishment, Glasgow, was brought before the Court at the Glasgow Winter Circuit, charged with the wickedly and feloniously Obtaining of Goods or Money by Extortion and Oppression of the Lieges; more particularly the wickedly and feloniously Extorting of Goods or Money from the Lieges without legal warrant, and under colour of law, by instituting or threatening prosecutions for alleged offences, to the oppression of the lieges, and in defraud of public justice;

IN SO FAR AS, the said George Jeffrey having formed the design of extorting money and goods, for his own use, from a great number of persons in or near to the city of Glasgow, by means of instituting or threatening prosecutions against them on charges of contravening certain Acts of Parliament, did commence and maintain a system of extortion and oppression of the lieges by the said means, and did, on numerous occasions, between the month of January 1834 and the month of October 1839, institute prosecutions, by presenting complaints and informations to the Justices of Peace for the county of Lanark, in terms of an Act of Parliament passed in the 17th year of King George III.

No. 78. George Jeffrey, Jan. 22 1840.

Extortion and Oppression

c. 56, entitled 'An Act for amending and rendering more effectual 'the several laws now in being for the more effectual preventing of 'frauds and abuses, by persons employed in the manufacture of hats, 'and in the woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, 'mohair, and silk manufactures: and also for making provisions to pre-'vent frauds by journeymen dyers,' against certain individuals residing or carrying on business in or near Glasgow, whom he alleged to have been guilty of contravening that Act, and did threaten prosecutions under the said statute against certain other individuals residing or carrying on business in or near Glasgow, and did, by terror of his proceedings so begun or threatened under colour of law, wickedly and feloniously, and without legal warrant, extort various sums of money and quantities of goods from the parties against whom he instituted or threatened prosecutions as aforesaid, which he appropriated to his own use, and in consideration whereof, he did privately abandon the proceedings so commenced or threatened by him, in manifest oppression of the lieges, and defraud of public justice: In particular, (1.) the said George Jeffrey did, in the course of the spring of 1834, the particular time being to the Prosecutor unknown, enter and search the premises in Kirk-Street of Calton, near Glasgow, occupied by John M'Millan, weaver, residing there, and did, under a warrant which he had obtained, or pretended to have obtained from the Justices of the Peace for the county of Lanark, seize and carry away eighteen spindles of cotton yarn, and a half spindle of silk yarn or thereby alleged by him to have been acquired by, or to be in the possession of the said John M'Millan, in violation of the said Act of Parliament of the 17th year of the reign of King George III. cap. 56, and he did threaten or institute a prosecution against the said John M'Millan, for contravention of the said Act of Parliament; but instead of following out, regularly and in due course of law, the proceedings in such prosecution threatened or instituted by him as aforesaid, did, within the premises situated in Kirk-street aforesaid, then occupied by the said John M'Millan, or within the Gorbals Police Office, situated in Lauriston or Gorbals, near Glasgow, or in some other place to the Prosecutor unknown, wickedly, unwarrantably, and feloniously, and under colour of law, and by terror of the proceedings threatened or instituted by him as aforesaid, extort from the said John M'Millan the sum of L.10 sterling, in consideration whereof he privately abandoned, or agreed to abandon the said prosecution; and did appropriate the said sum of L.10 sterling to his own uses and purposes, to the oppression of the said John M'Millan, and in defraud of public justice: Farther, (2.) on the 30th of January 1836, the said George Jeffrey did institute a prosecution by presenting an information and complaint to the Justices of Peace for the county of Lanark, against William Arnot, cotton waste dealer, residing in Bell-street of Glasgow, for contravention of the said Act of

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Parliament, and did, in virtue of a warrant obtained by him from James Browne, Esquire, and John Lang, Esquire, two of the said Justices of Peace, dated the said 30th January, 1836, enter and search the premises of the said William Arnot, in Bell-street aforesaid, and did seize and carry away a bag, containing seventeen bobbins of silk, and a number of other articles of silk, Thibet wool, linen yarn, cotton thread and yarn, he alleging the same to have been acquired by, or to be in the possession of the said William Arnot, in violation of the act of Parliament aforesaid, but instead of following out, regularly and in due course of law, the proceedings in the prosecution instituted by him as aforesaid, he did, in a court adjoining the Justice of Peace clerk's office, situated in Hutchison-street of Glasgow, or in the said Justice of Peace clerk's office, or in some other place to the Prosecutor unknown, wickedly, unwarrantably, and feloniously, and under colour of law, and by terror of his said proceedings, extort from the said William Arnot the sum of L.15 sterling, in consideration whereof he privately abandoned the said prosecution, and he did appropriate the said sum of L.15 sterling to his own use, to the oppression of the said William Arnot, and in defraud of public justice: Farther, (3,) on the 6th of November 1837 the said George Jeffrey did institute a prosecution, by presenting an information and complaint to the Justices of the Peace for the county of Lanark, against John Robertson cloth-merchant in Candleriggs-street of Glasgow, for contravention of the said Act of Parliament, and in virtue of a warrant obtained by him of the date last above libelled, from John Mitchel and James Browne, Esquires, two of the said Justices of Peace, he did enter and search the premises, situated in Candleriggs aforesaid, then occupied as a warehouse by the said John Robertson, and did seize and carry away a bag, containing about one hundred weight or thereby of silk waste, he alleging the same to have been acquired by, or to be in the possession of the said John Robertson, in violation of the said Act of Parliament: and the said John Robertson having appeared to defend himself against his complaint and information, and having been brought before John Lang, and James Browne, Esquires, two of the said Justices of Peace, and having been found liable on the 7th day of December 1837, in the penalty of L.20 sterling, and failing payment of which ordained to be committed to the House of Correction in Glasgow, in terms of the said Act, that is, for one month, and the said John Robertson having appealed to the Quarter Sessions, in terms of the said Act, the said George Jeffrey did, on one or other of the days of January 1838, the particular date being to the prosecutor unknown, under a warrant which he had, or pretended to have obtained, from the Justices of peace of Lanarkshire aforesaid, enter and again search the house of the said John Robertson, and did seize and carry away two lots of drysaltery goods, consisting of smalts and cochineal and cotton yarns, which he alleged to have been acquired by or to be in the possession of the said John Robertson, in violation of

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the said Act, and the said George Jeffrey did threaten or institute a prosecution against the said John Robertson for contravention of the said Act, but instead of following out, regularly and in due course of law, the proceedings in such prosecution threatened or instituted by him as aforesaid, the said George Jeffrey did, on or about the date last above libelled, and within the office in Miller-street, of Glasgow, occupied by David Niven, writer there, or in some other place to the prosecutor unknown, wickedly, unwarrantably, and feloniously, and under colour of law, and by terror of his said proceedings, extort from the said John Robertson the sum of L.20 sterling, in consideration whereof he did privately abandon the prosecution last above libelled, threatened or instituted by him, as aforesaid, as well as the prosecution against the said John Robertson first above libelled, in which the judgment of the Justices had been obtained, and an appeal had been taken as aforesaid, and did appropriate the said sum of L.20 to his own use, to the oppression of the said John Robertson, and in defraud of public justice.

The Indictment contained thirteen other similar charges.

The pannel pleaded guilty to six of the charges contained in the Indictment.

Lords MEADOWBANK and MONCREIFF certified the case, in regard to the punishment to follow on the above confession, to the High Court of Justiciary. It came to be advised this day.

ROBERTSON, for the pannel,—stated in mitigation of punishment, that he had always applied the money which he obtained in payment of the expenses of the prosecutions, and that, from the number of suspensions which were brought to the Court of Justiciary, he had been no gainer. He also produced various certificates of the good conduct of the pannel in the discharge of his official duties.

The LORD JUSTICE CLERK, in proposing that the pannel should be sentenced to nine months imprisonment, observed,—it is a painful duty to inflict punishment on an individual who, in regard to his other public services, has been able to produce such testimony. But we must keep in view our duty to the public, to repress an offence of so

serious a nature. The charges are of this description—that the pannel, taking upon himself the office of a common informer, (an office which, I beg to say, was inconsistent with the duties of the situation which he held in the police,) instituted prosecutions, and even procured convictions against various persons, whom he thus induced to give him considerable sums of money, in order to compromise the charge, and this money he appropriated wholly to himself, though, if it had been imposed by a convicting magistrate, one half of it would have gone to the poor.

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LORD MEADOWBANK.—One of the worst features of the case, in my eyes, is that the pannel pretended to compound cases, while he could not protect the parties from other complaints, at the instance of other informers.

LORD MONCREIFF.—Though the present case is new in its circumstances, a charge of extortion and oppression is not new in our law. The pannel has turned the terror produced by his position into an instrument of extortion. In the circumstances, I assent to the very lenient sentence which has been proposed, only in respect that this is the first case of precisely the same kind that has occurred.

In respect of his judicial confession, the pannel was sentenced to be imprisoned in the Jail of Glasgow, for the period of nine calendar months.

HER MAJESTY'S ADVOCATE.—*Sol.-Gen. Ivory—Innes.*

AGAINST

JAMES MONTEITH.—*B. R. Bell.*

ATTEMPT AT HOUSE-BREAKING.—A charge of attempt at house-breaking, with attempt to steal, abandoned; but an indictment for 'the wickedly and feloniously breaking the door of a house for the purpose of entering and stealing therefrom,' found relevant.

No. 79. James Monteith.

JAMES MONTEITH was brought before the Court on the

No. 79. James Monteith, Jan. 22 1840.

Attempt at House-breaking.

6th November 1839, charged with 'Attempt at House-'breaking, with intent to Steal, as also the Wickedly and 'Feloniously breaking the door of a House for the purpose 'of entering and Stealing therefrom.' Informations were ordered on the relevancy of the Indictment, which were accordingly lodged; and the case came to be advised this day.

The SOLICITOR-GENERAL, for the prosecution,—stated, that feeling the inexpediency of pressing any new *nomen juris*, he had, from the first, been willing to withdraw the charge of attempt at house-breaking with intent to steal, which accordingly he now proposed to do.

The LORD JUSTICE-CLERK.—As to the second charge, I can have no difficulty in thinking it a point of dittay. The security of a house depends on its doors. If that security is violated for a felonious purpose, there can be no doubt that that is a criminal matter. The only question for the consideration of the Lord Advocate would be, whether a case of such a nature should not be tried by the Sheriff. But if it is brought here, the charge is clearly relevant, although the intent to steal may sometimes be difficult of proof.

The other Judges having expressed their concurrence, The Court found the libel, as restricted, relevant; but, on the motion of the Solicitor-General, the diet against the pannel was deserted pro *loco et tempore*.[1]

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[1] The pannel was brought before the Court on the 12th of March, charged with "wickedly and feloniously breaking the door of a house for the purpose of entering and stealing therefrom." He pleaded guilty, and it was stated in mitigation of punishment, that he had already been confined in Jail for seven months. He was sentenced to three months imprisonment in Bridewell.

MICHAEL MALONIE, Suspender—*Neaves—Macfarlane*

AGAINST

GEORGE JEFFREY, Respondent—*Robertson.*

SUSPENSION AND LIBERATION.—STATUTE 17th GEO. III. c. 56.—
1. A Suspension of a judgment under the above statute is competent, although no appeal has been taken to the Quarter Sessions.
2. A complaint, under the above statute, having been presented to the Justices of Peace, and persisted in at several diets of Court, regularly adjourned, and an adjournment having been made to a particular day, on which day the Court did not meet, the judgment pronounced on a subsequent day suspended, in respect the charge had been allowed to fall.

No. 80. Malonie v. Jeffrey, Jan. 22 1840.

Susp. & Lib.

On the 13th of February 1839, the Respondent presented to the Justices of the Peace for Lanarkshire, a Petition and Complaint, under the statute 17th Geo. III. c. 56, §§ 10, 14, and 16, setting forth, 'that the Com-'plainer has been informed, and has good cause to suspect 'that purloined or embezzled materials, of iron, mixed or 'unmixed, wrought or unwrought, together with drugs 'and ingredients used in dying or preparing the manu-'factures of woollen, linen, silk, and cotton materials, are 'concealed and to be found in the dwelling-house, out-'house, yard, garden, or other place or places occupied by 'Michael Malonie, dealer in old iron and rags, and situa-'ted in Moncrieff Street, Gorbals, and shire of Lanark,' and praying for warrant of search and the apprehension of the Suspender, and thereafter, in the event of conviction, for the penalty and punishment prescribed by the 14th section of the statute.[1]

[1] This section provides, 'That every person deemed and adjudg-'ed guilty of a misdemeanour, in having in his or her possession mate-'rials suspected to be purloined or embezzled, and not producing 'the party or parties being duly entitled to dispose of the same, 'of whom he or she bought or received the same, nor giving

No. 80. Malonie v. Jeffrey, Jan. 22 1840.

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The Respondent having made oath to the truth of his complaint, warrant was granted as craved; and on the same day certain pieces of iron and a quantity of soap were carried away from the Suspender's premises, and he himself was apprehended. The case was brought before the Justices on the 15th of February, when the Suspender emitted a declaration, on advising which the Justices pronounced an interlocutor, allowing him a proof, and adjourning the case till that day week. At the diet to which the case was thus adjourned, (22d February), one Justice only attended; and the case was consequently adjourned for another week. On the 1st of March, and again by adjournment on the 8th and 29th, several witnesses were examined for the Suspender. He then de-

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'satisfactory account how he or she came by the same; or of a misdemeanour in having, carrying or conveying of the said materials suspected to be purloined or embezzled, and not producing the party or parties being duly entitled to dispose of the same, of whom he or she bought or received the same, nor any credible witness to testify upon oath, or (being of the people called Quakers) upon solemn affirmation of the sale or delivery thereof, nor giving a satisfactory account how he or she came by the same, (as the case shall be,) shall, for every such misdemeanour forfeit, for the first offence, the sum of twenty pounds, and for the second offence, the sum of thirty pounds, and for each subsequent offence the sum of forty pounds; all which said respective forfeitures shall and may be levied by distress and sale of the goods and chattels of every such offender, (rendering to him or her the overplus after charges of the said distress and sale deducted,) by warrant under the hands and seals of the Justices before whom such offender may be deemed and adjudged guilty; of which forfeiture one moity shall be paid to the informer, and the other moity thereof to and amongst the poor of the parish, town, or place where such conviction shall be, or to such public charity or charities as the Justices convicting shall appoint; and if no sufficient distress shall be found whereon to levy the said respective forfeitures, then the said Justices shall and may commit every such offender so respectively deemed and adjudged as guilty aforesaid, to the common gaol, or other prison or house of correction, within his or their jurisdiction, without bail or mainprise, for the space of one month for the first offence, and for the second offence, for the space of two months, and for every subsequent offence for the space of six months.'

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cared his proof closed, and an interlocutor was pronounced, adjourning the case till Friday, the 12th of April, when parties were appointed to be heard, and the case disposed of. The Court, however, did not meet on that day, and of course no interlocutor of adjournment was pronounced. But, on the 26th of April, the parties attended before the Justices, in consequence of having received notice to that effect. The Suspender's law agent, who attended him thoughout the proceedings, was heard in support of his defence, after which the Justices pronounced a judgment, convicting him of a misdemeanour in terms of the statute libelled on, and finding him liable in the penalty of L.20. Some days afterwards there was reported to the Justices, an execution by an officer, setting forth that he had passed to the premises of the Suspender, in order to levy the penalty by distress and sale, but that he 'found nothing 'like sufficient goods and chattels whereon to levy for 'the amount of said penalty.' The Justices accordingly committed the Suspender to the Bridewell of Glasgow, for one month.

Malonie having been incarcerated under this sentence, presented a bill of suspension and liberation on the following, among other grounds, (1.) The adjournment of the 22nd of February was illegal, as one Justice only was present. (2.) The case having been specially adjourned to the 12th April, and there having been no Court, and consequently no adjournment on that day, the charge fell to the ground. (3.) The sentence of imprisonment was incompetent, in respect no attempt was previously made to levy the penalty, by attaching and selling the Suspender's goods.

The case came to be advised this day.

ROBERTSON, for the Respondent,—argued, that the Suspension was incompetent. The 10th section of the statute creates a new offence, empowering any two Justices to grant warrant of search for embezzled or purloined

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materials, and ordaining that if the party in whose possession they are found does not account 'to the satisfaction of such Justices,' how he came by them, he shall be deemed guilty of a misdemeanour. Then the 14th section prescribes the punishment, the 20th gives a power to appeal to the Quarter Sessions, and the 22nd provides, 'that 'no order made touching or concerning any of the matters 'in this act contained, or any proceedings to be had touch-'ing the conviction of any offender or offenders against 'the said act of the 22nd of Geo. II. or this act, shall be 'quashed for want of form, or be removed or removable by 'certiorari into his Majesty's Court of King's Bench.' Unless the proceedings before the Justices were not within the statute, suspension is incompetent. If it had been intended that such cases were to be reviewed on the merits, provision would have been made for taking the proof in writing, which, though it was done here, is not authorised by the statute. The proper remedy against a judgment which was considered erroneous on the merits, was an appeal to the Quarter Sessions, and of that the Suspender has not availed himself.

NEAVES, for the Suspender, answered,—It is certain that cases under the statute are reviewable on the merits. (Case of Gillies *v.* Jeffrey, December 4 1839, *ante*, p. 454). Suspension has been found competent without any appeal to the Quarter Sessions, and also when notice of appeal had been given, but allowed to fall. (Yeaman *v.* Tod, 11th July 1836, 1 Swinton, p. 247. Kennedy *v.* Young, 13 March 1837. Ib. p. 474.)

The Court repelled the objection stated to the competency of the suspension, and Counsel having been heard on the merits, the following opinions were delivered:—

The LORD JUSTICE-CLERK.—I have had very considerable hesitation in this case. But I must own that the objection founded on the adjournment of the 29th March,

appears to me somewhat formidable. Although the strict rules of criminal procedure are not perhaps to be required in these proceedings before the Justices, yet we must take care that there is no such serious irregularity, as might be injurious to the party. There might be circumstances in which a party would not be allowed to avail himself of a merely technical objection. But this is not such a case. We have often found that objections which would prove fatal to the subsequent procedure, are not precluded, by not having been taken at the time. The necessity of regular adjournments pervades all criminal proceedings. And in holding that the irregularity which took .place here, is fatal to the judgment, we are applying, not the strict forms of Justiciary practice, but only such rules of criminal procedure as are applicable to the circumstances of the case.

LORD MEADOWBANK.—I am inclined to the same opinion. We are not required to adapt to the proceedings before the Justices all the rules of this and other more regular Criminal Courts. But if we were to hold, that all the rules of criminal procedure might be so disregarded, as that the Justices might, by their own act, proceed on one day or another, without the party being certiorated by a regular adjournment, great evil might accrue. The statute evidently contemplates adjournments; and during the previous steps of the case, they were regularly made. But the process fell on the 12th of April, by the absence of any judge, who alone could adjourn. This appears to me not a question of form, but of substance. There was no means of wakening the process, and the sentence was therefore altogether a nullity.

LORD MACKENZIE.—I feel some difficulty, but I cannot concur in the opinions which have been delivered. The statute declares, that no proceeding touching the conviction of any offender against this act, shall be quashed for want of form. This must mean essential forms,—forms that would, but for this provision, have quashed the conviction. Now, is the matter which was

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omitted here, of greater importance than other essential forms? In this Court itself, the adjournment is little more than a form. One judge can adjourn the Court without a quorum. Baron Hume says the clerk can do it; and I suppose that was once the rule. In the present case, the want of a regular adjournment was the omission of a mere form. For the party and his agent received notice, and attended on the 26th April. In that respect I hold his presence to be of importance. If objections founded on form had not been excluded by the statute, I should have had no hesitation in the case, after the opinions which have been delivered. But I am not able to get over the provisions of the 22nd section.

LORD MONCREIFF.—I do not think that we are to hold the 22nd section as of no effect. But there may be things which, though at first they appear matters of form, are so material, as to go to the substance of the thing. According to the view taken by Lord Mackenzie, I do not see how we could have come to the decision we gave in the case of Yeaman *v.* Tod, to which reference has been made. I agree in thinking that the objection here is one of substance, not of form, and of most essential substance. The process against the Suspender came to an end on the 12th of April, and the fact of his having been present on the 26th, makes no difference.

LORD MEDWYN.—I agree in thinking that if this objection would have been good, if stated before the Justices, it would be good now. But I cannot overlook the twenty-second section of the statute. I think an adjournment is a matter of form. In Yeaman's case, it was necessary to show that the Justices had jurisdiction. A specification of the *locus* was therefore not form but substance. If I thought the objection here founded on a matter of substance, I would concur in sustaining it. But I think otherwise.

LORD COCKBURN.—But for the opinions which have been delivered, I should have been very clearly of opinion,

that the point here founded on, is a mere matter of form. What is the objection, if not matter of form? There was an adjournment *de facto*. The objection taken is, that the parties did not go through the form (as I call it,) of writing down their resolution to do this. Then the Suspender appeared on the 26th of April. If he had then represented that he was not prepared for the case being taken up, time would no doubt have been granted. But he made no such application; he never thought of this objection. It was left to the subsequent ingenuity of mere formalists to find it out. Suppose, however, that the objection had been stated to the Justices, I am clearly of opinion that it would not have been good. When we rise to-day, the clerk will proclaim that various diets are adjourned till a certain day. If this were omitted, the objection would prevail. But it would do so, only because there is no statute declaring that matters of form are not to vitiate proceedings in this Court.

The LORD JUSTICE-GENERAL.—I am inclined to think that this is a formidable objection. If there had been an adjournment, but the interlocutor declaring it had been signed by one Justice only, that would have been matter of form. But there was here no adjournment—there was no Court to adjourn. From that moment the process was at an end. And I cannot think that the prisoner, by appearing on the 26th, lost the benefit of the objection.

The Court accordingly sustained the objection to the want of any adjournment of the diet of Court on the 12th of April 1838, and therefore suspended the letters, with expenses.

CHARLES FISHER, S.S.C.—W. MUIR, S.S.C.—*Agents.*

Feb. 19
1840.

Present,

LORDS MEADOWBANK, MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE—*Sol. Gen. Ivory—Handyside*

AGAINST

DAVID PETER, and JOHN SMITH.—*Moncreiff.—C. Robertson.*

ROBBERY.—PROCESS.—CONFESSION.—PROOF.—1. Two pannels convicted of Robbery and discharging loaded fire arms, sentenced to transportation for life.

2. One of two pannels having, previous to the Jury being impannelled, tendered a plea of guilty, which was put upon record, held, that the Public Prosecutor had the option of either moving for sentence under that confession, or proving the case against both pannels.

No. 81. David Peter, and John Smith.

Robbery.

DAVID PETER and JOHN SMITH, were charged with Robbery; as also Assault with intent to Rob; as also the Wilfully, Maliciously, and Unlawfully discharging Loaded Fire arms at any of Her Majesty's subjects; and with contravention of the act 10th Geo. IV. c. 38, § 2.

The pannel Peter pleaded not guilty, and the pannel Smith guilty.

These pleas were accordingly entered upon the record, and a Jury was impannelled to try the case.

The SOLICITOR-GENERAL proposed to lead evidence against both pannels, and insisted upon his right to prove and read to the Jury the declaration of John Smith, the pannel who had pleaded guilty.

MONCREIFF, for the pannels, argued, that as Smith had pleaded guilty, it was incompetent for the Public prosecutor to go into the case against him; that though his declaration was not admissible as evidence against Peter, yet it might, if read, have the effect of influencing the

jury; and that nothing was more likely to operate to the prejudice of a prisoner, whose guilt was still unestablished, than the mixing up with his case that of another who had confessed.

THE SOLICITOR-GENERAL, for the prosecution, answered—The confession of Smith, though recorded, has not been accepted; and therefore it is still in the power of the Public prosecutor to lead his evidence. Notwithstanding the act of 9th Geo. IV. c. 29, the prosecutor has still the choice either of moving for sentence upon the confession which has been made, or of proceeding with the case before the jury, as he may think proper. A different rule would defeat the course of justice, and would prove most injurious to the public, as a criminal might, whenever he pleased, prevent the particulars of his guilt from being made known, by tendering a confession at the outset of the trial.

LORD MEADOWBANK.—The pannel Smith has volunteered a plea of guilty; and the question is simply, whether the Public prosecutor has not the discretion of either accepting that plea, or of proving the case against him by leading evidence.

LORD MEDWYN.—The pannel has undoubtedly the privilege of making a judicial confession; but it is equally beyond doubt, that the Public prosecutor is not bound to accept it unless he pleases, and may notwithstanding go into evidence. Baron Hume (vol. II. p. 282,) states the law both previous and subsequent to the statute 9th Geo. IV. c. 29; and I do not think that that act militates in the least degree against the Public prosecutor. The provision which it contains is not, that it shall not be *competent*, but merely that it shall no longer be *necessary* to go before a jury, in order to prove the case against a pannel who has pleaded guilty. The prosecutor may still give the prisoner the chance of a trial. Alison (vol. II. p. 368,) says, "it need hardly be observed, that it is competent for a pannel to plead guilty at any stage of his trial," but he shews that the Court may decline to accept the plea; and, in illustration, quotes the case of Stewart and others, Glasgow

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Sept. 1826, where a confession by one of the prisoners having been tendered when the jury were about to be enclosed, "the Lord Justice-Clerk declined to receive the confession at so late a stage, and the jury were charged with the case, and returned a verdict as to him of not proven." In the present case I am clearly of opinion, that the Public prosecutor has an alternative course, and may either accept the plea, or claim a verdict upon the other evidence which he is prepared to lead.

LORD COCKBURN.—I entirely concur. The Court has no occasion to inquire into the motives of the Public prosecutor. The counsel for the prisoner Peter doubtless expects some advantage from separating his case from that of Smith; and, on the other hand, the prosecutor may hope to gain some advantage, by going into the whole matter against both. The law provides against the declaration of one pannel being used as evidence against another, and thus a sufficient protection is afforded to Peter. The late statute of Geo. IV. gives no countenance to the present objection. By the former law, a plea of guilty did not avoid a jury; there still required to be a verdict, and this plea was used merely *as evidence*. So long as things remained in this situation, it was impossible to say that the plea stopped the accuser from leading more evidence if he chose; for what right could one party have to prescribe the range of his evidence to the other?—Now, what odds does the recent statute make? All that it enacts is, that where a prosecutor chooses he *may* demand judgment at once on the plea; or, in other words, that where he does not wish to adduce more proof, a verdict is unnecessary. But it nowhere enacts that where he does wish for more proof, and chooses to take the risk of a verdict, he cannot do it. As to the words of style in the Indictment, viz. "all which, or part thereof being found proven by the verdict of an assize, *or admitted by the respective judicial confessions* of you the said David Peter, and John Smith," the meaning is, that when the prosecutor, in the exercise of the discretion which belongs to him, accepts the confession

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offered by a prisoner before the jury had been impannelled, such confession shall be a sufficient warrant upon which the Court may at once pronounce sentence. Here there are two pannels; but suppose a case in which there is only one; if the prosecutor has no discretion in the present instance, would he not be as much bound in every other, even that of a single prisoner, to accept the plea? The ends of justice might in this way be defeated, and, rather than submit to the disgrace of exposure, accused persons would at once plead guilty, merely for the purpose of avoiding it, and of trying to attract the sympathy generally given to apparent penitence. Many cases have occurred, in which the prisoner has actually been acquitted after tendering his confession. Were I called upon as a legislator to say, whether the pannels should at once receive sentence, without farther inquiry, upon their confession being recorded, I might have some difficulty in making up my mind. But being here required merely to say what the law actually is, I am of opinion that the objection which has been stated for the prisoners should be repelled. And I have only to add, that the point maintained for the pannels is contrary to the undoubted practice of the Court. The understanding and the usage has always been, that a prosecutor might proceed and prove his case by other evidence if he chose, and that the prisoner had no absolute power to exclude the light, by merely pleading guilty.

Lord Meadowbank.—I concur with both your Lordships, and I can bear witness to the frequent practice of proceeding with the trial, notwithstanding a plea of guilty.

The Court accordingly repelled the objection, and allowed the Public prosecutor to proceed with the case as against both pannels. After the examination of several witnesses, the pannel David Peter, at the request of his counsel, was again interrogated upon the libel; when he pleaded guilty as libelled; and the pannel John Smith

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being interrogated, adhered to the confession which he had previously made.

The Solicitor-General having restricted the pains of law to an arbitrary punishment, the Jury unanimously found the pannels guilty upon the evidence, and in the terms of their own confessions.

In respect of which verdict of Assize, they were sentenced to be transported beyond seas, for the whole period of their natural lives.

March 12 1840.

Present,

LORDS MEADOWBANK, MACKENZIE, MONCREIFF.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Ivory—Napier.*

AGAINST

AGNES or ANN BLAIR or MUNRO—*Moncreiff.*

WITNESS—PARENT AND CHILD—1. A father adduced to prove an assault on him by his child, has not an option to decline giving evidence.
2. A mother examined as an exculpatory witness in the trial of her daughter, after having been informed of her option to decline giving evidence in the case.

No. 82. Agnes Blair or Munro.

Assault.

AGNES or ANN BLAIR or MUNRO was charged with Assault, especially when committed by means of stabbing or cutting, and to the effusion of the blood, the injury of the person, and the danger of the life.

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[1] On referring to the recent statute, 1 Victoria, c. 87, it appeared that the offence of highway robbery, when committed without cutting, maiming, or wounding, is not now punishable capitally in England. The Solicitor-General, in restricting the libel, as noticed in the text, said that he considered himself justified in adopting this course, by the circumstance, that this was the first case of highway robbery which had been tried in Scotland since the passing of the statute.

She pleaded not guilty.

No. 82. Agnes Blair or Munro, March 12 1840.

Assault.

1. JOHN BLAIR, the father of the pannel, and the party on whom the assault was charged to have been committed, having been called as a witness,

MONCREIFF, for the pannel, argued that he had the option of declining to give evidence against his child, and moved the Court to inform the witness of his option accordingly.

The SOLICITOR-GENERAL and NAPIER, for the prosecution, answered, that when, as here, the assault was charged to have been committed against the parent himself, he had no option, but might be compelled to give evidence.

After consulting with the Lord Justice-Clerk, who was sitting in an adjoining room trying civil causes, the Court unanimously refused the motion made on the part of the pannel; and the witness, John Blair, was accordingly sworn and examined.

2. In the course of the exculpatory evidence, MARGARET WOOD or BLAIR, wife of John Blair, and mother of the pannel, having been called,

It was explained to the witness by the Court, that she had an option to decline giving evidence on the trial of her daughter, whereupon she said she would decline. She was afterwards informed, that though she had been originally summoned by the Crown, she was now called to give evidence for the pannel, upon which she stated that she would give her evidence, and was sworn and examined accordingly.

The Jury unanimously found the pannel guilty, as libelled. Judgment was delayed till the following day, (March 13), when, in respect of the foregoing verdict of

No. 82. Agnes Blair or Munro, March 13 1840.

Assize, the pannel was sentenced to be transported beyond seas, for the period of seven years.

Assault.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Ivory—Napier.*

AGAINST

GEORGE GUNN MUNRO—*Robertson.*

POST OFFICE.—STATUTE 1ST VICTORIA, c. 36.—A Post-office Clerk who pleaded guilty of contravention of the above statute, by embezzling and secreting a letter containing a five pound note, sentenced to seven years transportation.

No. 83. George Gunn Munro, March 12 1840.

Embezzling a money letter.

GEORGE GUNN MUNRO, was charged with contravention of the act 1st Victoria, c. 36, entitled 'An act for 'consolidating the laws relative to offences against the 'Post-office of the United Kingdom, and for regulating 'the judicial administration of the Post-office laws, and 'for explaining certain terms and expressions employed in 'those laws,' by which it is enacted, § 26,

'That every person employed under the Post-office who shall steal, 'or shall for any purpose whatever embezzle, secrete, or destroy, a 'post letter, shall, in England and Ireland, be guilty of felony, and in 'Scotland, of a high crime and offence, and shall, at the discretion of 'the Court, either be transported beyond the seas for the term of 'seven years, or be imprisoned for any term not exceeding three years; 'and if any such post letter so stolen or embezzled, secreted, or de-'stroyed, shall contain therein any chattel or money whatsoever, or any 'valuable security, every such offender shall be transported beyond the 'seas for life;' and (§ 27.) 'That every person who shall steal from or 'out of a post letter any chattel or money, or valuable security, shall, 'in England and Ireland, be guilty of felony, and in Scotland, of a 'high crime and offence, and shall be transported beyond the seas for 'life;' and (§ 41.) 'That every person convicted of any offence for 'which the punishment of transportation for life is herein awarded, 'shall be liable to be transported beyond the seas for life, or for any 'term not less than seven years, or to be imprisoned for any term not 'exceeding four years; and every person convicted of any offence, pu-'nishable according to the Post-office acts by transportation for four-'teen years, shall be liable to be transported for any term not exceed-'ing fourteen years, nor less than seven years:' IN SO FAR AS, Peter

No. 83. George Gunn Munro, March 12 1840.

Embezzling a money letter.

Lamb, searcher in the customs at Leith, in the county of Edinburgh, and residing in or near Vanburgh Place, in or near Leith aforesaid, having, upon the 16th of October 1839 delivered, or caused to be delivered to the Post-office at Leith aforesaid, for the purpose of being duly transmitted by the post, according to the address after-mentioned, a letter from himself, the said Peter Lamb, to his brother, Robert Lamb, a superannuated carpenter in her Majesty's royal navy, residing in or near Gloucester Street, in or near Morricetown, in or near Devonport, in the county of Devon, in England, bearing to be addressed 'Mr Robt. Lamb 56. Gloucester Street, Moricetown, Devonport,' or having thereon an address of similar import, and containing therein a Bank of England note for the sum of five pounds sterling, bearing to be dated and numbered London 13 April 1839 $\frac{7}{9}$06290, or having thereon a similar date and number, or some other date and number to the Prosecutor unknown, the said George Gunn Munro, time above libelled, and within or near to the said Post-office at Leith aforesaid, and he being at the time employed under the Post-office of the United Kingdom, did steal, or did embezzle, or secrete the said letter containing therein the said Bank of England note for five pounds sterling, the said letter being at the time a post letter, and the same, with the said Bank of England note contained therein, being the property or in the lawful possession of her Majesty's Postmaster-General.

The Indictment contained two other similar charges.

The pannel pleaded guilty of this first charge, and the SOLICITOR-GENERAL, for the prosecution, departed from the other two.

ROBERTSON, for the pannel, addressed the Court in mitigation of punishment, and produced certificates of his previous good character.

LORD MACKENZIE.—The crime here committed comes directly within the twenty-sixth and twenty-seventh sections of the statute. The punishment prescribed by the former of these is transportation for life, and although this is very materially modified by the forty-first section, the charge to which the pannel has pleaded guilty remains 'a 'high crime and offence,' and one most injurious to the interests of society. When the legislature gave the Court power to modify the sentence, it was never meant that the punishment should not be one of a severe nature;

No. 83. George Gunn Munro, March 12 1840.

and, in the circumstances of this case, we should not be warranted in pronouncing a sentence short of transportation.

Embezzling a money letter.

The other Judges having expressed their concurrence, the pannel, in respect of his judicial confession, was sentenced to be transported beyond seas, for the period of seven years.

March 17 1840.

Present,

THE LORD JUSTICE-CLERK,

LORDS MACKENZIE, MEDWYN.

HER MAJESTY'S ADVOCATE,—*Sol.-Gen. Ivory—Napier.*

AGAINST

WILLIAM BRASH AND ROBERT WHITE.—*B. R. Bell.*

CONFESSION—PROOF—AGGRAVATION OF HABIT AND REPUTE.—1. One of two pannels having, previous to the Jury being impanelled, tendered a plea of guilty, which was put upon record, but which the Public Prosecutor refused to accept,—question, whether it is competent to read this plea to the Jury as an adminicle of evidence.

2. The aggravation of being habit and repute a thief is not established, unless the pannel is proved to have borne that character for twelve months next previous to the date of trial.

No. 84. William Brash and Robert White.

Theft, &c.

WILLIAM BRASH, and ROBERT WHITE, were charged with Theft, aggravated in the case of Brash by his being habit and repute a thief, and having been previously convicted of theft, and in that of White by previous conviction.

1. The pannel Brash pleaded not guilty, and the pannel White guilty. The plea of the latter was entered on the record before the Jury was impannelled, but NAPIER, for the prosecution, stated that he did not accept it, and evidence was led in regard to both pannels.

No 84. William Brash and Robert White, March 17 1840.

Theft, &c.

The proof having been concluded, the SOLICITOR-GENERAL, for the prosecution, addressed the Jury, stating that as the case was clearly proved by the witnesses, he did not on this occasion insist on his right to lay before them the confession of the pannel White.

B. R. BELL, for the pannels, answered, that although, in the circumstances of this case, he had no interest to comment upon the right claimed by the Public Prosecutor, he disputed the competency of reading to the Jury, as evidence, a plea not tendered in their presence, and not libelled on.

No opinion was expressed by the Court on this point.

2. In regard to the charge against the pannel Brash of being habit and repute a thief, it was proved that he had borne that character for a year previous to the end of August 1836; that since that time he had attended a school, where he remained a year and a half, and from which he was apprenticed to a master, in whose service he had continued for nine months; that he left the service eight or nine months ago, and had ever since been considered a common thief. The previous convictions proved against him were dated 28th March 1836, 27th October 1836, 3d August 1839, and 13th December 1839.

The Court held that the charge of being habit and repute a thief had not been established, as that character had not attached to the pannel for twelve months next previous to the date of trial. That part of the charge was accordingly abandoned.

The Jury found the pannels guilty.

In respect of which verdict of Assize, the pannel Brash was sentenced to be transported beyond seas, for the period of seven years; and the pannel White to be imprisoned in the Bridewell of Edinburgh, for the period of fifteen calendar months.

SOUTH CIRCUIT.

Spring 1840.

April 27
1840.

DUMFRIES.

Judges.—Lords Mackenzie and Medwyn.

Her Majesty's Advocate—*Davidson.*

AGAINST

Wilhelmina Macdonald Fraser—*Broun.*

Housebreaking.—In a case of housebreaking charged to have been committed '*by forcing open the outer door of the said house*, or otherwise to the Prosecutor unknown,' the statement of the *modus operandi* is sufficiently specific.

No. 85.
Wilhelmina Fraser.
———
Theft, &c.

Wilhelmina Macdonald Fraser, was charged with Theft, by housebreaking, which was stated to have been committed 'by forcing open the outer door of the 'said house, or otherwise to the Prosecutor unknown.'

Broun, for the pannel, objected, that the charge of housebreaking was not sufficiently specific. The Indictment ought to have stated the mode in which the door was forced open. (Case of John Humphreys and others, Dumfries, May 1, 1837. Swinton, Vol. I p. 498.)

Davidson, for the prosecution, answered,—The decision said to have been given in the case of Humphreys was repudiated by the Lord Justice-Clerk in a subsequent case, (William Ritchie, Dec. 4, 1837. Swinton, Vol. 1, p. 595.) The entry in this last case was by a window. The difference between such a case, and that of a door, is that in the former, it is only necessary to state that the window was opened, whereas in the latter, as it is the proper way of access, it must be stated that force was used.

The form adopted in the Indictment is the uniform mode of libelling house-breaking.

No. 85. Wilhelmina Fraser, Dumfries, April 27 1840.

Theft, &c.

LORD MACKENZIE.—The charge of house-breaking appears to me to be sufficiently specific. To a certain extent the case of Ritchie is an authority, for no mode of opening was there stated.

LORD MEDWYN.—I thought the Indictment in Humphreys' case relevant, and I can have no doubt that the specification is sufficient here.

The objection was accordingly repelled.

The pannel pleaded not guilty, and a proof was led. The Jury found her guilty, as libelled.

In respect of which verdict of Assize, she was sentenced to be transported beyond seas, for the period of seven years.

WEST CIRCUIT.

Spring 1840.

GLASGOW.

May 5 1840.

Judges.—LORDS MEADOWBANK AND COCKBURN.

HER MAJESTY'S ADVOCATE—*Innes.*

AGAINST

JANET CONNOWAY OR LAIRD.—*A. Wood, Jun.*

UTTERING BASE COIN—EVIDENCE.—A pannel convicted of uttering base coin, although the fact of the coin being bad was proved only by the evidence of a witness; and the coin itself, which was admitted to have been in the hands of the Public Prosecutor, and was libelled on as a production, was not shown to the Jury.

JANET CONNOWAY or LAIRD, was charged with contravention of the statute 2nd William IV. c. 34, § 7, in having

No. 86. Janet Laird.

No. 86. Janet Laird Glasgow, May 5, 1840.

tendered a counterfeit sixpence, in payment of a small quantity of bread, she having been twice previously convicted of a similar offence.

Uttering Base Coin.

She pleaded not guilty, and a proof was led.

The shop-keeper, to whom the coin in question was tendered, stated that he immediately suspected it to be bad, and that, on trying it, he found it was made of soft or brittle metal, and broke in two with his fingers. He had delivered it to the authorities, by whom it was marked, and libelled on as a production; but it had since been mislaid, and could not be produced. The witness (who was a person of experience,) swore of his own knowledge that the coin was bad, and stated the fact of its breaking so readily as one reason of his opinion.

Lord Cockburn, in charging the Jury, stated, that they were to judge whether or not the baseness of the coin was made out by the evidence of this witness, and that if they believed him, and were satisfied with his grounds of knowledge, they would be justified in convicting the pannel.[1]

The Jury unanimously found the pannel guilty.

In respect of which verdict of Assize, she was sentenced to be transported beyond seas, for the period of seven years.

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[1] See the opinion of Lord Moncreiff in the similar case of M'Ginnes and Johnstone, High Court, July 16, 1839, *ante* p. 435.

HIGH COURT.

Present,

May 27
1840.

THE LORD JUSTICE-GENERAL.

THE LORD JUSTICE-CLERK.

LORDS MONCREIFF, MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Maitland*—Handyside.*

AGAINST

DUNCAN CATTANACH—*E. S. Gordon.*

FORGERY—A pannel who had adhibited to a Bill of Exchange the subscriptions, by mark, of two parties as acceptors, found to be relevantly charged with Forgery.

No. 87.
Duncan Cattanach.
Forgery.

DUNCAN CATTANACH was brought before the Circuit Court at Inverness, charged, along with his son, JOHN CATTANACH, with the crime of Forgery, as also the using and uttering as genuine any forged bill of exchange, or other obligatory writing, having thereon any forged subscription, knowing the same to be forged:

IN SO FAR AS, upon the 21st of December 1838, within the house situated in Dingwall, occupied by the said Duncan Cattanach, or at some other time and place to the Prosecutor unknown, the said Duncan Cattanach, and John Cattanach, did both and each, or one or other of them, wickedly and feloniously forge and adhibit, or cause or procure to be forged and adhibited upon a bill of exchange for L.25, sterling, bearing to be dated "Dingwall, 21st Decr. 1838," and to be payable four months after date, and to be addressed "To Messrs Duncan Mac-"Donald, and Donald Macdonal, joint tacksmen of Allanachlach of Allan-

* James Ivory, Esq., the late Solicitor-General, having been appointed one of the Lords of Council and Session, in room of Lord Glenlee resigned, Thomas Maitland, Esq., Advocate, this day presented his commission, and was admitted and received in Court as Her Majesty's Solicitor-General, having been already received and admitted in that character in the Court of Session.

No. 87. Duncan Cattanach, May 27 1840.

Forgery.

"grenge, conjunctly and severally," and to be subscribed, "Donald "M'Donald," as drawer, and "Donald M'Donald jr. Allanclach," as first "indorser, Kenneth Dingwall, second indorser, the subscriptions, Duncan "his ✕ mark MacDonald," and "Donald his ✕ mark Macdonald,' as the subscriptions by mark respectively of the acceptors named in said bill, intending the same to be in imitation of, and to pass for, and to be received as the genuine subscriptions by mark of Duncan MacDonald *alias* MacJan, farmer at Allannaclach of Allangrange, in the parish of Kilmuir Wester, or Knockbain, and county of Ross, and Donald MacDonald *alias* MacJan, farmer at Allannaclach of Allangrange aforesaid, and they did then and there sign their own names as witnesses to the said subscriptions, by mark, of the said Duncan M'Donald, and Donald M'Donald, forged and adhibited by them as aforesaid: FURTHER, upon the 22d December 1838, and within the office in Dingwall of the branch of the Aberdeen Town and County Bank, the said Duncan Cattanach, and John Cattanach, did both and each, or one or other of them, wickedly and feloniously use and utter as genuine the said bill of exchange, having thereon the said forged subscriptions by mark, they well knowing the same to be forged, as said is, by then and there delivering the same to Colin Munro, then agent for the said branch of the said bank, and residing in Dingwall aforesaid, or to James Andrews, clerk or teller in the said branch, and residing in Dingwall aforesaid, in order to be discounted, and the same was discounted accordingly.

An objection having been stated to the relevancy of the Indictment, the Lord Justice-Clerk and Lord Moncreiff certified the case to the High Court. It came to be advised this day.

E. S. GORDON, for the pannel, argued,—Forgery is defined by Mr. Alison, (vol. i. p. 371), 'the fabrication of 'false and obligatory writs, to the prejudice of another, 'with intent to defraud.' It has been settled, that it is not necessary to the constitution of the crime that the writing forged be an imitation of the handwriting of another; and Mr. Alison remarks, (vol. i. p. 376), 'It 'is also forgery if one put his own name on a negotiable 'instrument, instead of one of the same name, but of a 'different designation, for whom it was intended.' The present case appears, at first sight, to be one in which the pannel is brought more closely into connection with the crime. But, in all the cases which have been found to be

No. 87
Duncan
Cattanach,
May 27
1840.
Forgery.

forgery, there has been adhibited to the document the subscription of some person, on which the party to whom it was uttered was entitled to rely as binding him. But a subscription by mark does not bind the party. Reference is made by Mr. Alison (p. 379), to the case of the forgery of the name of a person who cannot write at all. But that case is clearly distinguishable from the present, because the party to whom the writing is presented is entitled to rely on the signature which it bears. It is true that the crime here committed is forgery in England. But it is observed by Mr. Hume, (vol. i. p. 144), that 'this may not afford a certain inference with respect to 'our law; both because something may depend on the 'binding power of such instruments in civil matters, ac- 'cording to the practice of the two countries, and because 'the frequent tricks and devices of all sorts, which occur 'in the more busy and corrupted market of that king- 'dom, have led to a broader construction of the crime of 'forgery in general in their courts, than has yet been re- 'ceived in ours.' Besides, the present point does not seem to have been argued, either in the case of *Dunn*, (erroneously quoted by Mr. Alison as that of *Dewar*), or in that of Fitzgerald, (Russell, vol. ii. pp. 326, 344). Now, the utmost extent to which the Civil court has gone in favour of a writ signed by mark, is to hold that it may be an adminicle of evidence against the party. But, in order to such a writ being sustained, it is necessary to prove, (1.) that the party was in use so to sign, and (2.) that he *de facto* did so sign the writ in question, (Ersk. III. 2, 8. Brown *v.* Johnston, 1669; M. 16803). Since, then, the document, in the present case, is one on which no summary diligence could be used, which could not, *per se*, be the foundation of an action, but must be supported by other evidence, the *species facti* charged does not amount to Forgery. Even if this objection did not apply, the Indictment would be bad, as it is not stated that the party was in the habit of signing by mark.

No. 87. Duncan Cattanach, May 27 1840.

Forgery.

HANDYSIDE, for the prosecution, answered,—There is certainly no decision of the Court on this point, and Baron Hume expresses some doubt regarding it, though his opinion inclines towards holding this to be Forgery. But the general principles of the law, in regard to that crime, are such as will sustain this Indictment. Forgery is defined by Hume, (vol. i. p. 140), 'the felonious making and 'publishing of a writing to the prejudice of another, as 'the *signed instrument* of a person who has not signed 'it.' Manual subscription, therefore, is not necessary to the constitution of the crime of Forgery. An instrument may be *signed* otherwise than by *subscription*, as was formerly the case when seals were used. It is not necessary that the writing should be obligatory; and it is, therefore, immaterial, that the Indictment omits to state that the party was in the habit of subscribing by mark.

The LORD JUSTICE-CLERK.—I certainly do not regret the course that we adopted in certifying this case, since there had been no deliberate judgment of the Court, finding this a relevant charge of Forgery. Having now heard the argument on this point, I am of opinion that the Indictment is good. I agree in thinking that the opinion of Mr. Hume rather inclines towards holding the crime here committed to be Forgery. In England the point seems to be quite settled, and I am much afraid that the spread of corruption, which is referred to by Mr. Hume as having led, in that country, to 'a broader construction of the 'crime of forgery,' is now unhappily characteristic of Scotland also.

LORD MONCREIFF.—I also am of opinion that we did right in certifying this case, since the point was new. But, having heard the argument, I am now quite satisfied that the crime charged is Forgery, according to the principles of the law of Scotland. It is not necessary to the constitution of that crime, that the writing the signature to which is forged should be obligatory. It is to be supposed that the bankers knew that this was the ordinary

mode of signature employed by the party whose mark was forged, and that they were thus deceived.

No. 87. Duncan Cattanach, May 27 1840.

Forgery.

Lord Medwyn.—I concur. There is no doubt that the bankers were deceived, for the bill was discounted.

Lord Cockburn.—I am of the same opinion, and on similar grounds. I think the writing in question was an obligatory writing. But, supposing it were not, the crime would not the less be Forgery.

The Lord Justice-General.—I have come to the same conclusion, though not, perhaps, with the same ease, because I am always against extending crimes to new cases.

The Court accordingly repelled the objection stated to the relevancy of the Indictment, and, on the motion of the Solicitor-General, deserted the diet against the pannel, *pro loco et tempore.*

Present,

June 22 1840.

The Lord Justice-Clerk.

Lords Mackenzie, Moncreiff.

Her Majesty's Advocate—*Handyside—Craufurd*

AGAINST

John Jones and Edward Malone—*Moncreiff—Cleghorn.*

Culpable Homicide—Indictment—Locus Delicti.—1. An objection to the relevancy of an indictment for culpable homicide, repelled.

2. A charge of culpable homicide given up, and the pannels acquitted, in consequence of an erroneous statement of the *locus delicti.*

No. 88. John Jones and Edward Malone.

John Jones and Edward Malone were charged, along with John M'Goveran, alternatively with Culpable Homicide, or Assault, aggravated by having been committed to the injury of the person, effusion of blood, and danger of life:

No. 88.
John Jones and Edward Malone, June 22 1840.

Culpable Homicide.

IN SO FAR AS, on the 17th of March 1840, and in St. Ann's Yards, in or near Edinburgh, the said John Jones, John M'Goveran, and Edward Malone did, all and each, or one or more of them, wickedly and feloniously attack and assault William Ford, then a day-patrol of the Edinburgh police establishment, and residing in the Tolbooth wynd, Canongate of Edinburgh, and did with their fists, and with their feet, strike and kick him on different parts of his body, and did with sticks, or other lethal weapons, strike him one or more severe blows on the head, which cut and wounded him to the serious injury of his person, great effusion of his blood, and danger of his life; and the said William Ford did not recover from the effects of the blow or blows so received by him on his head, and having been thereafter attacked with inflammation of the brain, or having contracted some other mortal disease, caused by the blow or blows so received by him on his head, he, in consequence thereof, died on or about the 22d day of April 1840, and was thus culpably bereaved of life by the said John Jones, John M'Goveran, and Edward Malone, or one or more of them.

The Indictment also contained a separate charge of aggravated assault on a different policeman against M'Goveran. He having failed to appear, sentence of fugitation was pronounced against him.

MONCREIFF, for the pannels Jones and Malone, objected to the way in which the cause of death was set forth in the Indictment

The objection was repelled.

The pannels pleaded not guilty, and a proof was led.

It turned out that the assault libelled on was committed, not in *St. Ann's Yards*, as stated in the Indictment, but in the King's Park, which is a totally separate place, and is divided from St. Ann's Yards by a garden and a wall.

In these circumstances, the case for the prosecution was given up, and the jury, under the direction of the Lord Justice-Clerk, found the pannels not guilty.

In respect of which verdict of Assize, they were assoilzied *simpliciter*, and dismissed from the bar.

Present,

June 29
1840.

THE LORD JUSTICE-CLERK.

LORDS MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE,—*Handyside—J. T. Gordon*

AGAINST

JAMES AND ROBERT MACKINTOSH—*B. R. Bell.*

FALSEHOOD, FRAUD, AND WILFUL IMPOSITION.—Two panuels having ordered goods from shopkeepers, under an agreement or understanding that they would pay for them on delivery, and having afterwards obtained possession of the goods by falsely pretending that they would pay for them at a specified time, found to be relevantly charged with falsehood, fraud, and wilful imposition.

No. 89.
James and Robert Mackintosh.

JAMES and ROBERT MACKINTOSH were charged with Falsehood, Fraud, and Wilful Imposition, aggravated in the case of James, by his having been previously convicted; as also with Swindling:

Falsehood, Fraud, &c.

IN SO FAR AS, the said James Mackintosh and Robert Mackintosh having devised together a fraudulent scheme, whereby to swindle various shopkeepers, under the false pretence of purchasing their goods, and paying for them on delivery, the said James Mackintosh and Robert Mackintosh, both and each, or one or other of them, did, on the 13th of February 1840, and within the house situated in Sandport street, North Leith, occupied by Christian Lyall or Watson, widow, falsely represent and pretend to the said Christian Lyall or Watson, that they were about to commence business, and had taken a counting-room in Leith, and that they wished to lodge in her house; and on the said false pretence, did induce and persuade the said Christian Lyall or Watson to let to them lodgings in her said house for one week; and having thus obtained possession of said lodgings, the said James Mackintosh and Robert Mackintosh did, both and each, or one or other of them, time above libelled, and within the shop of James Matthewson, grocer and spirit-dealer, situated in Sandport street aforesaid, purchase, and order to be sent and delivered at their said lodgings, four bottles of whisky, and six pounds of cheese or thereby, and they being unknown and strangers to the said James Matthewson, and to James Stevenson, shopman to the said

No. 89. James and Robert Mackintosh, June 29 1840. — Falsehood, Fraud, &c.

James Matthewson, it was agreed, or at least it was understood between them and the said James Stevenson, from whom they purchased and ordered the said goods, that they would on delivery pay the price thereof; and they did accordingly order a discharged account for the said goods to be sent along with them; and the said goods, along with the said discharged account, having been, time aforesaid, carried to their said lodgings by the said James Stevenson, they desired that one of the said bottles of whisky should be exchanged for a bottle of rum; and the said James Stevenson having accordingly taken back one of the bottles of whisky and replaced it with a bottle of rum, they did falsely pretend that they would pay the said James Stevenson for the whole goods in a quarter of an hour or thereby, and directed him to return for that purpose to their said lodgings; and they did, by this false pretence, wickedly and feloniously induce and persuade him meantime to leave the said goods in their possession, and they did immediately thereafter abscond from and leave their said lodgings, without paying any rent therefor, carrying away with them the said goods, and did appropriate to their own uses and purposes the said goods, and did fail to make payment of the price thereof to the said James Matthewson, or the said James Stevenson; and did thus wilfully impose upon the said James Stevenson, and did swindle him out of the possession of the said goods, and did defraud the said James Matthewson of the property or price thereof.

The Indictment contained five other similar charges.

B. R. Bell, for the pannel, objected to the relevancy of the Indictment, that the *species facti* libelled did not amount to the crime of falsehood, fraud, and wilful imposition, in as much as there was no assumption of a false character, (Hume, vol. i. p. 173), and that the charge of Swindling did not help out the Indictment.

Lord Cockburn.—I have no doubt that the Indictment is relevant. In order to incur the guilt here charged, it is not enough to order goods and then fail to pay for them. But it is enough when, as here, the order is combined with a resolution never to pay, entertained at the time.

The Lord Justice-Clerk.—I have no doubt that this is a relevant charge of falsehood, fraud, and wilful imposition. The additional charge of Swindling makes it neither better nor worse.

Lord Medwyn having expressed his concurrence, the

objection stated to the relevancy of the Indictment was repelled. No. 89. James and Robert Mackintosh, June 29. 1840.

The pannels pleaded not guilty, and a proof was led.

The Jury found them guilty of the four first charges as libelled. Falsehood, Fraud, &c.

In respect of which verdict of Assize, they were sentenced to be imprisoned in the Bridewell of Edinburgh, for the period of twelve calendar months.

Present, July 6 1840.

THE LORD JUSTICE-CLERK.

LORDS MACKENZIE, MONCREIFF.

HER MAJESTY'S ADVOCATE.—*Handyside—Craufurd*

AGAINST

THOMAS BAUCHOP.—*M'Neill—Mure.*

PERJURY.—EVIDENCE.—1. Certain words struck out of that part of an Indictment for Perjury which professed to give a true statement of the facts of the case, in respect they did not traverse the deposition by the pannel libelled as false.

2. Parole evidence admitted, as to an oath taken by the pannel, as a witness in a Small Debt Court, three years previous to the trial, for the purpose of supporting a charge of perjury in regard to a deposition subsequently emitted by him.

THOMAS BAUCHOP was charged with Perjury:[1] No. 90. Thomas Bauchop. Perjury.

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[1] The pannel had been brought before the Court on the 23d of March, under an Indictment which, after setting forth, as in the text, the oath of the 13th of June 1837, omitted the words, '*and the facts* '*then and there so sworn by the said Thomas Bauchop are true, and* '*were known by him to be true,*' and after narrating, as in the text, the oath of the 18th December 1838, and, charging the falsehood of the

No. 90. Thomas Bauchop, July 6 1840.

Perjury.

IN SO FAR AS, a certain agreement, partly set forth in a written minute, and partly expressed in a verbal addition to, and alteration of, the said written minute, made in amendment and correction thereof, before, or at the time, and as the condition of subscribing, and as an integral part of the same, having been entered into and concluded on or about the 4th day of June 1836, between John Condie, manager for the Company carrying on business at the Wilsontown Iron Works, in the parish of Carnwath, and county of Lanark, under the firm of William Dixon and Company, on the one part, and the said Thomas Bauchop, as surveyor to the Trustees on the Wilsontown and Lanark Road, on the other part; whereby it was agreed that, in consideration of the said company paying a sum of L.50, and for certain other considerations, the said Company should be allowed to convey to and from the said Iron Works free of toll, through the toll-bar at Wilsontown Chapel, in the said parish, coal, lime, limestone, ironstone, and iron; and, generally, every article belonging to the said Company, passing to and from said iron works, or at least every article belonging and passing as said is, excepting wood, hay, and straw, purchased in for the said works; and also and further, that the riding-horse or poney belonging to or used by the said John Condie himself should be allowed to pass to and fro through the said toll-bar free of toll; and all this, for the period of one year, from and after the 26th day of May 1836: And James Wipper, now or lately toll-keeper at the said toll-bar at Wilsontown Chapel aforesaid, having, on or about the 24th day of May 1837, raised a summons or claim, at his instance, before the Sheriff-court of Lanarkshire, under the small debt act, against the said John Condie, for certain toll-

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facts therein set forth, continued, 'OR OTHERWISE, if the facts so sworn 'to by the said Thomas Bauchop, as said is, upon the said 18th day of 'Dceember 1838, were not false, then, and in that case, the facts 'sworn to by him, as said is, upon the foresaid 13th day of June 1837, 'within the Sheriff court-room of Lanark aforesaid, and before the said 'Daniel Vere, Esq. Sheriff-substitute of Lanarkshire, were false, and 'were known to him at the time, viz. upon the said 13th day of June, 'to be false, and the said Thomas Bauchop did, after having been 'solemnly sworn to tell the truth as aforesaid, wickedly and feloniously, 'and wilfully and falsely swear and depone, in the terms of the said 'oath, which he then and there emitted, being the oath first herein be-'fore set forth.' It was objected to the relevancy of this Indictment, (1.) that the alternative mode of charging one or other of the oaths emitted as having been false, is incompetent, (Alison, vol. i. p. 476); and, (2.) that the charge regarding the oath of the 18th December is not relevantly laid, in as much as it is not stated in what particulars that oath was false. The Court ordered informations on the relevancy of his Indictment, but it was subsequently abandoned, and a new one prepared, in the form reported in the text.

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duties claimed from the said Company, for or in respect of articles belonging to the said Company, other than coal, lime, limestone, ironstone, and iron, and particularly for, or in respect of certain quantities of clay, slag, stones, bricks, and others, belonging as said is, which had passed through the said toll-bar, to or from the said iron works, during the period from the said 26th day of May 1836 to the 27th day of April 1837 or thereby; as well as for certain toll-duties claimed during the same period from the said John Condie himself, or from the said Company, for, or in respect of, the said John Condie's riding-horse or poney aforesaid; and the said Thomas Bauchop having been adduced as a witness by the said John Condie in support of his defence in the said action; and the said Thomas Bauchop having, on or about the 13th day of June 1837, at Lanark, and within the Sheriff-court there, appeared before Daniel Vere, Esquire, Sheriff-substitute of Lanarkshire, and having been by him solemnly sworn to tell the truth, and examined as a witness, the said Thomas Bauchop deliberately and knowingly made oath in substance and to the effect following, viz. that an agreement had, on or about the said 4th day of June 1836, been entered into between the said John Condie and the said Thomas Bauchop, in their respective characters aforesaid, to the effect, that not merely coal, lime, limestone, ironstone, and iron, but also all other articles belonging to the said Company, or at least all articles belonging as said is, except wood, hay, and straw, purchased in for the said iron works, and more especially all clay, slag, stones, bricks, and others, such as were enumerated in the said claim insisted in as aforesaid by the said James Wipper, or in the account therein referred to, and belonging to the said Company as said is, as well as the said John Condie's own riding horse or poney as aforesaid, should be allowed to pass through the said toll-bar free of duty, during the said period, from the 26th day of May 1836 to the 27th day of April 1837, or thereby; and the facts then and there so sworn by the said Thomas Bauchop are true, and were known by him to be true; and the said Sheriff-substitute, while he held the facts, thus sworn to by the said Thomas Bauchop, irrelevant and unavailing as in the particular question with the said James Wipper, and therefore decerned against the said John Condie for L.7. 6s. 3d., being the amount of toll duties claimed by the said James Wipper, at the same time, in reference to the matter which had been so sworn, expressly reserved to the said John Condie, or to the said Company, action against the Road Trustees, and made, or caused to be made, an entry accordingly to that or the like effect in the act-book of court; and the said James Wipper having, on or about the 19th day of June 1837, raised another summons or claim at his instance, in the said Sheriff-court, under the same small debt act, against the said John Condie, for certain other toll-duties claimed from the said Company; and the said Sheriff having in like manner decerned for the sum of L.1. 18s. 6d., being the amount of toll-duties claimed in the said second summons or

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claim; and the said John Condie having retained the amount of the said two sums in settling with the said Thomas Bauchop on account of the said Road Trustees; and the said Thomas Bauchop having thereafter, namely, on or about the 3d day of July 1837, raised a summons at his instance, as surveyor to the said Road Trustees, before the Sheriff of Lanarkshire, against the said John Condie, concluding for the sum of L.12. 10s., being the whole amount of instalment then payable under the agreement above libelled; and certain proceedings having followed in the said action: and the said John Condie having, in the course thereof, lodged a minute referring to the oath of the said Thomas Bauchop, certain facts averred by him in the said process; and which were material to the defence stated by him to the conclusions of the said summons; and the said Sheriff-substitute of the said county having sustained the said reference, and appointed him to appear in the Sheriff-court-room of Lanark, to depone thereon, the said Thomas Bauchop did, on the 18th day of December 1838, at Lanark, within the Sheriff-court-room there, appear before the said Daniel Vere, Esquire, Sheriff-substitute of Lanarkshire, and did, after being solemnly sworn to speak the truth, wickedly and feloniously, and wilfully, and falsely swear and depone upon the said reference in the terms of the following deposition, which was, then and there, duly subscribed by the said Thomas Bauchop, and by the said Sheriff-substitute.

'At Lanark, the eighteenth day of December eighteen hundred and 'thirty-eight,

'In the process, Thomas Bauchop, residing at Brucefield, surveyor 'to the Trustees on the Wilsontown and Lanark road, against John 'Condie, manager for the Wilsontown Iron works,

'In presence of Daniel Vere, Esquire, Sheriff-substitute, compeared 'Thomas Bauchop, the pursuer, who being solemnly sworn and exa-'mined, depones, that he does not remember of sending the defender 'any draft of the agreement, number two of process, previous to its 'being signed; that he recollects of having called at the works at Wil-'sontown for the defender, taking with him a minute of agreement, ex-'tended, and that the deponent and Mr. Condie afterwards went to the 'store to procure witnesses for their signature. Interrogated, Whether 'Mr. Condie, after there reading the minute of agreement, refused to 'subscribe it, because it did not contain a sufficient enumeration of the 'articles which were to pass the toll free of duty? depones, That the 'deponent has no recollection of this, and thinks he never hesitated 'about it. Interrogated, Whether Mr. Condie did not say that it was 'his understanding of the bargain, that every thing was to pass free, 'except articles purchased into the work, such as wood, hay, and 'straw? depones, That that was never mentioned. Interrogated, 'Whether Mr. Condie did not ask the deponent to write at the bottom 'of the agreement, that every article, except wood, hay, and straw, was 'to pass toll free? depones, That he did not; and depones, that the

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'deponent did not say that it was difficult to enumerate every article 'which was to be exempted, nor did he say that the Company was to 'be exempted from toll-duty of every description for, and in considera- 'tion of, the sum mentioned in the agreement. Depones, That the de- 'ponent did not, at the meeting referred to, say, 'I will pass my word "and my honour that every article goes through the toll free, just as "you have expressed yourself,' or words to that effect; nor did the de- 'fender say that it was on such faith that he subscribed the agreement. 'Interrogated, Whether he recollects, after the agreement was signed, 'of Mr. Condie saying that the only article which had been omitted to 'be spoken of was his own private horse, and whether the deponent 'then answered, 'well, as we have got all settled but that, if the toll- "man should charge you for it, I'll rather pay it out of my own pocket "than see you pay it,' or words to that effect? depones, That at the 'meeting in the store, above deponed to, no such statement was made, 'or expression used either by one party or another; but depones, 'That about a fortnight thereafter, as the deponent was passing through 'Wilsontown, he saw Mr. Condie, who told him that the tollman had 'charged him (Mr. Condie) for his horse; and the deponent then 'said that he would rather pay it himself. Interrogated, Whether the 'deponent did not lead the defender to understand before he sub- 'scribed the agreement, number two of process, and whether it was 'not the understanding of the parties, that every article belonging 'to the Company at Wilsontown was to be allowed to pass to and from 'the works free of duty? depones, That it was certainly not the un- 'derstanding; and that he would not have agreed to that for two hun- 'dred pounds; and all this he declares to be truth, as he shall answer 'to God.' Whereas the truth is, and it will be proved, that the facts so sworn to by the said Thomas Bauchop, or part thereof, are false, and were known by him, at the time, to be false: Inasmuch as, *the truth is, and he well knew, that on the occasion referred to in his said deposition, viz. on or about the 4th day of June* 1836, *an agreement had been entered into between him and the said John Condie, which was in substance, and to the effect, that not merely coal, lime, limestone, ironstone, and iron, being the articles enumerated in the minute of agreement referred to in his said deposition, but also all other articles belonging to the said Company referred to in said deposition, meaning thereby the Company carrying on business at the Wilsontown Iron works, or at least all articles belonging as said is, except wood, hay, and straw, purchased in for the said iron works, being the works referred to in his said deposition, and also and farther the said John Condie's own riding-horse or poney should be allowed to pass the toll referred to in his said deposition, meaning thereby the toll-bar at Wilsontown Chapel aforesaid, free of duty or toll, during the term of the said agreement, viz. from the 26th day of May* 1836 *to the 27th day of May* 1837: *And* the truth is, and he well knew, that the said John Condie, upon the said occasion referred to in his said

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deposition, did, in the first instance, refuse to subscribe the said minute of agreement, because it did not contain a sufficient enumeration of the articles which were to pass the toll free of duty, and only did at last subscribe it upon his verbally agreeing that the meaning and condition, and the actual effect of the bargain as concluded between them, was that, besides the articles enumerated in the said minute, all articles belonging to the said Company, except wood, hay, and straw, purchased in for the said work, should be allowed to pass the said toll free of duty as aforesaid: And, farther, the truth is, and he well knew,—that upon the said occasion, the said John Condie did say that it was his understanding of the bargain that every thing was to pass free, except articles purchased into the work, such as wood, hay, and straw:—and that the said John Condie did ask the said Thomas Bauchop to write at the bottom of the agreement, that every article except wood, hay, and straw, was to pass toll-free;—and that the said Thomas Bauchop did, at the meeting referred to, say, that it was difficult to enumerate every article which was to be exempted, and did say that the Company was to be exempted from toll-duty of every description, for and in consideration of the sum mentioned in the agreement;—and that the said Thomas Bauchop did, then and there, farther say, 'I will pass my word 'and my honour that every article goes through the toll free, just as 'you have expressed yourself,' or did use words to that effect;—and that the said John Condie did say, that it was on such faith that he subscribed the agreement:—and that after the agreement was signed, the said John Condie did say, the only article which had been omitted to be spoken of was his own private horse;—and that the said Thomas Bauchop then answered, 'well, as we have got all settled but that, if 'the toll-man should charge you for it, I'll rather pay it out of my own 'pocket,' or did use words to that effect.

MURE, for the pannel, objected to the relevancy of the Indictment, in as much as the statement of the facts, as to the agreement between Condie and the pannel, did not traverse the allegation contained in the pannel's deposition. The question which the pannel is asked, and to which he depones negatively, is, 'whether it was not the under-'standing of the parties that *every article* belonging to 'the Company was to be allowed to pass free of duty.' But when the Indictment proceeds to state what 'the 'truth is, and the pannel well knew,' the statement as to '*every article*,' is qualified by the words, '*or at least* 'all articles belonging as said is, except wood, hay, and 'straw, &c.'

HANDYSIDE, for the prosecution, answered,—The words objected to are not intended to traverse the particular part of the pannel's deposition referred to, but merely to state generally, in opposition to it, what the Prosecutor alleges to be the truth of the case.

M'NEILL, for the pannel, replied,—The last statement in the pannel's deposition is not alleged to be false. The narrative of facts, as to the agreement with Condie, is not the reverse of anything contained in the pannel's oath. Everything which does not traverse the oath must be struck out of that part of the Indictment.

An opinion having been expressed by the Court that the objection was well-founded, the ADVOCATE-DEPUTE consented to the passage printed in italics being struck out of the Indictment, as irrelevant.

The pannel pleaded not guilty.

In the course of the proof, John Condie, a witness for the prosecution, having deponed that the pannel was examined as a witness before the Sheriff-substitute of Lanarkshire, in a case against him (Condie) under the Small Debt Act, on the 13th of June 1837, HANDYSIDE, for the prosecution, proposed to ask what evidence the pannel then gave.

M'NEILL, for the pannel, objected to the competency of parole evidence, as to a deposition on oath, which was not taken down, and of which no record is kept. The proposed evidence is an attempt to disprove the written deposition of the pannel, not by proving facts contrary to it, but by proving, by the recollection of parties, what the pannel may have said on a different occasion. Even if he had sworn falsely on a different occasion, it would be immaterial to the present case.

HANDYSIDE, for the prosecution, answered,—It is admitted that there is no precedent exactly applicable to the present case, and that a charge of perjury is generally

No. 90. Thomas Bauchop, July 6 1840.

Forgery.

proved by some written evidence. It cannot be denied that the notes of a judge would be sufficient to establish a charge of perjury—and the point might arise, whether the same effect might not be given to the recollection of witnesses. But that is not the point here. If the charge had been one of emitting a false oath in the Small Debt Court, the objection would have been a formidable one. But the perjury charged is that contained in the signed deposition; and the prosecutor is entitled to bring evidence of previous depositions by the pannel, in order to prove that, on the occasion libelled, he swore what he knew to be false. The agreement between Condie and the pannel having been a verbal one, the whole facts regarding it must be proved by parole evidence, and must rest on the recollection of witnesses. Nor can the circumstance of the statement by the pannel having been made on oath, render that evidence incompetent which would otherwise have been admissible.

M'Neill, for the pannel, replied,—We are here in 1840, about to inquire, on the recollection of witnesses, what was said on oath in June 1837. It is admitted, that at this distance of time the pannel could not be convicted, on such evidence, of having taken a false oath in the Small Debt Court. But the distance of time is equally important, when it is attempted to prove that the oath recorded is false, because the pannel swore differently before.

The Lord Justice-Clerk stated, that the evidence proposed to be taken could not be excluded, but the effect of it remained for the consideration of the Jury.

The other Judges having expressed their concurrence, the objection was repelled, and the examination of the witness continued.

The proof having been concluded, the counsel on both sides addressed the Jury, and the Lord Justice-Clerk summed up the evidence.

The Jury unanimously found the pannel not guilty.

In respect of which verdict of Assize, he was assoilzied *simpliciter*, and dismissed from the bar.

No. 90. Thomas Bauchop, July 6 1840.

Perjury.

Present,

July 22, 1840.

LORDS MONCREIFF, MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE—*Handyside—J. T. Gordon.*

AGAINST

THOMAS PATERSON.—*B. R. Bell.*

THEFT.—A pannel who appropriated to his own use a sum of money in bank notes and silver, which he had received from his master, with instructions to deposit it in the bank—convicted of theft; and an objection to the relevancy of the Indictment, that the crime charged amounted to breach of trust only, repelled.

THOMAS PATERSON was charged with Theft,

No. 91. Thomas Paterson.

Theft.

IN SO FAR AS, the said Thomas Paterson, being at the date after libelled, in the employment of Charles Gray, baker, then and now or lately residing in Broughton Street, Edinburgh, and the said Charles Gray having, on the 23d of April 1839, within his house or shop situated in Broughton Street aforesaid, delivered to the said Thomas Paterson, the sum of L.20 sterling in bank or bankers' notes for L.1 sterling each, and silver money, along with his bank book, with instructions to carry and deposit the said money with the National Bank of Scotland, on account of the said Charles Gray, the said Thomas Paterson did, time above libelled, in or near Edinburgh, or at some other place to the Prosecutor unknown, wickedly and feloniously steal, and theftuously away take, the said sum of L.20 sterling, the property or in the lawful possession of the said Charles Gray.

B. R. BELL, for the pannel, objected to the relevancy of the Indictment, that the *species facti* libelled amounted to the crime of breach of trust only, and not to that of theft.

The objection was repelled.

No. 91. Thomas Paterson, July 22 1840.

Theft.

The pannel pleaded not guilty, and a proof was led.

The Jury found him guilty.

In respect of which verdict of Assize, he was sentenced to be imprisoned in the Bridewell of Edinburgh, for the period of twelve calendar months.

NORTH CIRCUIT.

Autumn 1840.

PERTH.

October 1 1840.

Judges.—LORDS MACKENZIE AND MEDWYN.

HER MAJESTY'S ADVOCATE.—*Crawfurd.*

AGAINST

PATRICK THOMAS CAULFIELD.—*Stuart.*

INDICTMENT—FALSEHOOD, FRAUD, AND WILFUL IMPOSITION.—In an Indictment for the above crime, the minor proposition of which contains a general narrative, followed by several specific charges, it is not necessary that the introductory narrative should be such as to constitute itself a relevant charge.

No. 92. Patrick Thomas Caulfield.

Falsehood, Fraud, &c.

PATRICK THOMAS CAULFIELD was charged with Falsehood, Fraud, and Wilful Imposition,

IN SO FAR AS, the said Patrick Thomas Caulfield having devised a wicked and felonious scheme for obtaining credit and money from the lieges, by false and fraudulent representations, did, in pursuance of the said scheme, in the course of the years 1837, 1838, and 1839, assume a false name and character, and did wickedly, falsely, and feloniously represent, and pretend to many persons in the city and county of Perth, that he was a baronet or a knight,—that he was a landed proprietor in Ireland,—that he had a factor in the management of his estate, and that he expected remittances of money. And, in particular (1.), on several occasions between the 1st day of March, and 13th day of September 1839, the particular time or times being to the Prosecutor unknown, and within the house in Bridgend of Perth, occupied by James Oliver, innkeeper there, the said Patrick Thomas Caulfield did wickedly, falsely, fraudulently, and feloniously represent and pretend to the

No. 92. Patrick Thomas Caulfield, Perth, October 1 1840. — Falsehood, Fraud, &c.

said James Oliver that his name was Sir Thomas Caulfield,—that he was a landed proprietor in Ireland, and had land at his disposal, which he wished to let,—that he had a factor in the management of his estate, from whom he expected remittances of money,—and he did, by these and the like false representations and pretences, wilfully and wickedly impose upon the said James Oliver, and did thereby prevail upon and induce him to advance on credit to him from time to time during the period above libelled, sums of money, victuals, liquor, and other articles to the amount of L.28, 5s. 11d. sterling, or thereby, which he did not repay or account for to the said James Oliver, but appropriated to his own uses and purposes, whereby the said James Oliver was defrauded and wilfully imposed upon by the said Patrick Thomas Caulfield.

The Indictment contained seven other similar charges.

STUART, for the pannel, objected to the relevancy of the Indictment, that the general charge in the minor proposition was not complete, as it did not contain an allegation of any result having followed the course of conduct libelled, which is necessary to constitute a proper criminal charge. (Alison, Vol. II. Pp. 232, 275.)

THE ADVOCATE-DEPUTE, for the prosecution, answered,—The part of the Indictment to which alone the objection applies, is not criminatory, but explanatory only. It does not in any way prejudice the pannel, and the Indictment would be good, though the general charge were struck out.

The Court repelled the objection, observing, that though the Indictment was not drawn in the usual and most correct form, with a general minor proposition relevant when separated from the particular charges, yet such a general minor is not essential, and the pannel is not prejudiced by the introduction into the libel of clauses which are merely explanatory, or preparatory of certain specific charges, all of which are admitted to be relevantly laid.

The pannel pleaded guilty of two of the charges contained in the Indictment.

No. 92. Patrick Thomas Caulfield, Perth, October 1 1840.

In respect of which judicial confession, he was sentenced to be imprisoned in the Jail of Perth, for the period of twelve calendar months.

Falsehood, Fraud, &c.

Nov. 23 1840.

HIGH COURT.

Present,

THE LORD JUSTICE-CLERK,

LORDS MONCREIFF, COCKBURN.

HER MAJESTY'S ADVOCATE.—*Craufurd—J. T. Gordon.*

AGAINST

JOHN MACKENZIE.—*Cleghorn.*

INDICTMENT—LOCUS DELICTI.—A Libel, charging a pannel with an aggravated Assault, found not proven, in consequence of an erroneous statement of the occupation of the house set forth as the *locus delicti.*

No. 93. John Mackenzie ——— Assault.

JOHN MACKENZIE, designed 'now or lately residing 'with Andrew Eagleton, labourer, now or lately residing 'in Innes Court, Pleasance, in or near Edinburgh,' was charged with Assault, aggravated by having been committed to the injury of the person, effusion of blood, and danger of life,

IN SO FAR AS, on the 27th of September 1840, the said John M'Kenzie did, within the house situated in Innes Court aforesaid, then and now or lately occupied by the said Andrew Eagleton, wickedly and feloniously attack and assault David M'Kenzie, mason, then and now or lately residing with the said Andrew Eagleton, and did with his fist strike him repeatedly on the head, face, and other parts of the body, and did, then and there, with a poker or piece of iron, or some other instrument to the Prosecutor unknown, strike the said David M'Kenzie one or more violent blows on the head, and did fell him to the ground, and, while he was on the ground, did kick him several times on the side, by all which he was severely cut and wounded, to the injury of his person, effusion of blood, and danger of life.

The pannel pleaded not guiltv, and a proof was led.

It turned out, that the house in which the pannel and the person assaulted were fellow-lodgers, and in which the assault libelled on took place, was not occupied by Andrew Eagleton, as set forth in the Indictment, but by his wife, Helen Williamson, or Eagleton. This woman (who, as well as others of the witnesses who lodged in the house in question, was designed 'now or lately residing with the said Andrew Eagleton,') deponed that she had taken the house in Innes Court in her own name, and that she lived in it apart from her husband, who occupied a house in a different part of the town. And the fact of the occupation being hers, and not her husband's, was fully proved by other witnesses.

No. 93. John Mackenzie, Nov. 23 1840. — Assault.

The Court, in these circumstances, stopped the case, and the Jury, under the direction of the LORD JUSTICE-CLERK, found the libel not proven.

In respect of which verdict of Assize, the pannel was assoilzied *simpliciter*, and dismissed from the bar.

Present,

THE LORD JUSTICE-CLERK.

LORDS MACKENZIE, MEDWYN.

Dec. 7 1840.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Maitland—Craufurd.*

AGAINST

WALTER HAMILTON SMITH—*Carnegy Ritchie.*

FORGERY—A pannel convicted of forging a certificate of poverty, and delivering it to a party for the purpose of obtaining charity, aggravated by a previous conviction,—sentenced to ten years transportation.

WALTER HAMILTON SMITH was charged with Forgery, especially when committed by a person who has been previously convicted of forgery, as also the wickedly and

No. 94. Walter Hamilton Smith.

No. 94. Walter Hamilton Smith, Dec. 7 1840.

Forgery.

feloniously using and uttering, as genuine, any forged writing, knowing the same to be forged, especially when committed by a person who has been previously convicted of using and uttering a forged writing, knowing the same to be forged,

IN SO FAR AS, on the 9th day of October 1840, in or near Edinburgh, or at some other time and place to the Prosecutor unknown, the said Walter Hamilton Smith did wickedly and feloniously write and fabricate, or cause and procure to be written and fabricated, a certificate or other writing, in the following or similar terms:—

'*St. Cuthberts Manse*,
'*9th Octr.* 1840.

'We the undersignd, having considered the State of the late Wil-'liam Smith's family consider that the rights of humanity would in a 'great measure be neglected were we to pass them over without assist-'ance:' And the said Walter Hamilton Smith did, time and place above libelled, or at some other time and place to the Prosecutor unknown, wickedly and feloniously forge and adhibit, or cause and procure to be forged and adhibited, on the said certificate or other writing, the words 'Davd. Dickson Min. James Craig C. Missy., William 'Cockburn Elder Geo. Gibson Elder;' intending the words, 'Davd. 'Dickson, Min.' to pass for, and be received as, the genuine subscription of the Reverend Doctor David Dickson, then and now or lately one of the ministers of the parish of Saint Cuthberts, in the county of Edinburgh, and then and now or lately residing at Saint Cuthberts Manse, in the parish and county aforesaid; and the words 'James 'Craig C. Missy.,' 'William Cockburn Elder,' and 'Geo. Gibson El-der,' to pass for, and be received as, the genuine subscriptions of some persons to the Prosecutor unknown, or being altogether fictitious subscriptions: Farther, the said Walter Hamilton Smith did, on the 10th of October 1840, and at or near to the door of the Manse of Currie, in the parish of Currie, in the county of Edinburgh, then and now or lately occupied by the Reverend Robert Jamieson, minister of said parish, wickedly and feloniously use and utter as genuine the false, fabricated, and forged certificate, or other writing above libelled, having thereon the said forged subscriptions, he well knowing the same to be forged, by then and there delivering the same to the said Robert Jamieson, for the purpose of inducing him to give him money on the credit of the said certificate, or other writing: And the said Walter Hamilton Smith has been previously convicted of forgery, and of using and uttering a forged writing as genuine, knowing the same to be forged.

The pannel pleaded not guilty, and a proof was led.

The Jury unanimously found him guilty, as libelled.

In respect of which verdict of Assize, he was sentenced to be transported beyond seas, for the period of ten years.

No. 94. Walter Hamilton Smith, Dec. 7 1840.

Forgery.

GLASGOW CIRCUIT.

Winter 1841.

Jan. 9 1841.

Judges.—Lords Medwyn and Cockburn.

Her Majesty's Advocate.—*Deas.*

AGAINST

Alexander Findlater and James M'Dougall,—*Hall Maxwell*—*W. S. Walker.*

Malversation in Office, and Breach of Public Trust.—Indictment.—Assault.—1. An Indictment for malversation in office, and breach of public trust objected to, and that charge abandoned.
2. Two pannels, who pleaded guilty of assault, especially when committed by an officer of the law upon a prisoner under his charge, or in his custody, and more especially still, when committed by such officer upon a prisoner, for the purpose of extorting from such prisoner a confession of guilt,—sentenced to imprisonment for nine and six months respectively.

Alexander Findlater, formerly superintendent of the police establishment of Anderston, and James MacDougall, a substitute police officer in the same establishment, were charged with Assault, especially when committed by an officer of the law upon a prisoner under his charge or in his custody, and more especially still when committed by such officer upon a prisoner for the purpose of extorting from such prisoner a confession of guilt; and the pannel Findlater was also charged with Malversation in Office and Breach of Public Trust, more particularly the effecting, by a superintendent of police, or

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Malversation in Office.

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his assisting to effect, a compromise between persons apprehended or in custody on a charge of theft, and the party or parties upon whose charge or complaint they were so apprehended or in custody, with the view ot preventing the said persons so apprehended from being brought to justice, and also the discharging or liberating, by such superintendent, of the said persons apprehended as aforesaid, without bringing such persons before a magistrate, or obtaining any lawful authority for discharging or liberating them from custody.

IN SO FAR AS, (1.) on the 20th of July 1840, John Lobb, lately a weaver, and now or lately a prisoner in the prison of Glasgow, having been apprehended by the said James M'Dougall, then a substitute police-officer in the police establishment of Anderston, of which establishment the said Alexander Findlater was then superintendent, and the said John Lobb having been taken by the said James M'Dougall to the police office of Anderston, and detained or confined therein, on a charge of having, on or about the 18th day of July 1840, stolen from the house occupied by Janet Dick, otherwise Lindsay, situated in or near North-street of Anderston, a silver watch, the property, or in the lawful possession of the said Janet Dick, otherwise Lindsay, the said Alexander Findlater and James M'Dougall did, both and each, or one or other of them, within or near to the police office of Anderston aforesaid, wickedly and feloniously attack and assault the said John Lobb, and did, with a pair of leather taws, or with some other weapon or weapons to the Prosecutor unknown, strike the said John Lobb several severe blows upon the back and other parts of his body, and did otherwise maltreat, beat, and abuse the said John Lobb to the injury of his person, and did handcuff or threaten to handcuff the said John Lobb, and did threaten to tie him to a drum, and to strike or beat him more severely than he had been struck or beaten as aforesaid, unless he would confess the foresaid crime of theft, of which he stood charged as aforesaid, and all this both and each, or one or other of them, the said Alexander Findlater and James M'Dougall, did for the wicked and felonious purpose of extorting from the said John Lobb a confession that he the said John Lobb was guilty of the foresaid crime of theft, of which he stood charged as aforesaid, and which confession was thereby extorted from the said John Lobb accordingly: And the said Alexander Findlater was, time first above libelled, superintendent of the police establishment of Anderston aforesaid, and as such was entrusted with the care of persons detained or confined in the police office of Anderston aforesaid, and with the superintendence of the conduct of the officers

and others employed in the said police establishment: And the said James M'Dougall was, time first above libelled, a substitute police-officer in the said police establishment, and, as such, entrusted with the custody or charge of persons detained or confined in the police office of Anderston aforesaid: LIKEAS, (2.) on the 10th of August 1840, Janet Shaw or Ferguson, and Mary Grieve, servants to, and residing with David Cowan, flesher, Argyle street of Glasgow, having been apprehended or in custody, on a charge or complaint made by the said David Cowan, and Mary Caldwell or Cowan, wife of, and residing with the said David Cowan, or one or other of them, of having, about the time last above libelled, stolen from the house in or near Argyle street of Glasgow, then occupied by the said David Cowan, certain sums of money, and various other articles, the property, or in the lawful possession of the said David Cowan, and of the said Mary Caldwell or Cowan, or of one or other of them; and the said Janet Shaw or Ferguson and Mary Grieve having been, both and each, or one or other of them, apprehended or in custody on the foresaid charge, and taken to the police office of Anderston aforesaid, and there brought before the said Alexander Findlater, as superintendent of the police establishment of Anderston aforesaid, the said Alexander Findlater, then holding the office of superintendent of the said police establishment, did, then and there, wickedly and feloniously, and in breach of the duties of his said office, and of the public trust reposed in him, as superintendent foresaid, and to the defraud or obstruction of public justice, effect, or assist in effecting, an illegal and unwarrantable compromise betwixt the said Janet Shaw or Ferguson and Mary Grieve, on the one hand, and the said Mary Caldwell or Cowan on the other hand, whereby the said Mary Caldwell or Cowan agreed to depart from the foresaid charge of theft against the said Janet Shaw or Ferguson and Mary Grieve, and the said Janet Shaw or Ferguson and Mary Grieve did, on condition of their being set at liberty, acknowledge themselves guilty of the foresaid charge of theft on which they had been apprehended, or were in custody as aforesaid, and whereby the said Janet Shaw or Ferguson and Mary Grieve did farther agree, in consequence of the said Mary Caldwell or Cowan departing from the said charge of theft against them, to leave her service, and to depart from all claim, at their instance, for wages against the said Mary Caldwell or Cowan: And the said Alexander Findlater did, in consequence of the said illegal and unwarrantable agreement and compromise entered into as aforesaid, and in implement thereof, in breach of his duty as superintendent foresaid, wickedly and feloniously, of his own authority, and without bringing the said Janet Shaw or Ferguson and Mary Grieve before a magistrate, or obtaining any lawful order or authority for liberating or discharging them from custody, liberate and discharge, or cause to be liberated or discharged from custody the said Janet Shaw or Ferguson and Mary

A. Fin. and J. M'Dougall. Glasgow, Jan. 9 1841.

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Grieve, and did thus defeat or obstruct, or attempt to defeat, the course of public justice, all in breach of the duties of his office, and of the public trust reposed in him as superintendent foresaid.

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Malversation in Office.

HALL MAXWELL, for the pannel, Findlater, objected to the relevancy of the Indictment, in respect the nature of the trust which he was charged with having broken, and the duties of the office in which the malversation was alleged to have been committed, were not set forth. It is the more necessary that this should be done, since breach of trust, in its common acceptation, involves fraudulent intromissions with money or effects, and malversation of office infers some bribe or personal advantage.

The opinion of the Court seemed to be, that the objection was well founded, and their Lordships were inclined to certify the case.

DEAS, for the prosecution, consented to depart from the charge of malversation in office and breach of public trust.

The pannels pleaded guilty of the assault as libelled.

In respect of which judicial confession, they were sentenced to be imprisoned in the prison of Glasgow, Findlater for the period of nine, and M'Dougall for six calendar months.

HIGH COURT.

Present,

THE LORD JUSTICE-CLERK.

LORDS MEADOWBANK, COCKBURN.

Feb. 15
1841.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Maitland—Crawford.*

AGAINST

MARY ANN CAIRNS, THOMAS PURVES AND MARTHA CONNOR OR PURVES.—*F. Russell.*

WITNESS.—PARENT AND CHILD.—STATUTE 3D AND 4TH VICTORIA, c. 59.—A girl, under the years of pupillarity, found, under the provisions of the above statute, to be an admissible witness against her father.

No. 96.
Mary Ann Cairns, and others.
Theft, &c.

MARY ANN CAIRNS, THOMAS PURVES and MARTHA CONNOR or PURVES were charged, the first with the crime of Theft, the second alternatively with Theft or Reset, and the third with Theft, aggravated by previous conviction.

They pleaded not guilty, and a proof was led.

MARY ANN PURVES, daughter of the pannel Thomas Purves, a girl under eleven years of age, was tendered as a witness for the prosecution.

F. RUSSELL, for the pannels, objected to the admissibility of the witness. The statute 3d and 4th Victoria, c. 59, § 1,[1] although it takes away the option which for-

[1] 'That from and after the passing of this act, it shall, by the law of 'Scotland, be no objection to the admissibility of any witness, that he or 'she is the father or mother, or son or daughter, or brother or sister,

No. 96. Mary Ann Cairns, and others, Feb. 15 1841.

Theft, &c.

merly enabled parents, and children not within the years of pupillarity, respectively to decline giving evidence against each other, does not render admissible a pupil child, who has been, by a long course of decisions, determined to be an *incompetent* witness against a parent.

CRAUFURD, for the prosecution, answered,—A child was always a competent witness against a parent, with the right of exercising the option of giving or declining to give evidence. The principle on which a pupil child has been excluded was, that the Court held that a child of such tender years was not in a condition to use with discretion the option committed to children, and that, therefore, there was no other course but to refuse such testimony. Since, however, the *option* is now taken away from children generally, this principle no longer applies, and there seems no reason why a pupil child should not be admitted.

LORD MEADOWBANK.—I was at first disposed to repel the objection, but, on examining the words of the recent statute, I have great doubts whether it is not well founded. The statute merely takes away the option. A pupil child had formerly no option, and therefore is not affected by this provision of the statute.

LORD COCKBURN.—Having a decided opinion, that a child has always been a competent witness against a parent, and that the reason why a pupil child was not admitted was, that it was considered not fit to exercise the option of giving or declining to give evidence, I can have no doubt that, under the words of the statute, the witness is admissible.

The LORD JUSTICE-CLERK.—I am clearly of the same opinion.

' by consanguinity or affinity, or uncle or aunt, or nephew or neice by ' consanguinity, of any party adducing such witness in any action, ' cause, prosecution, or other judicial proceeding, civil or criminal; nor ' shall it be competent to any witness to decline to be examined and ' give evidence on the ground of any such relationship.'

The objection was accordingly repelled, and the witness examined.

No. 96. Mary Ann Cairns, and others, Feb. 15 1841

The proof having been concluded, the Jury unanimously found the pannel, Mary Ann Cairns, guilty of the theft libelled, and the pannel, Thomas Purves, guilty of the reset libelled, and the libel against the pannel, Martha Connor or Purves, not proven.

Theft, &c.

In respect of which verdict of Assize, Cairns was sentenced to be transported beyond seas, for the period of seven years; and Purves to be imprisoned in the Bridewell of Edinburgh, for the period of ten calendar months; and Connor or Purves was assoilized *simpliciter*, and dismissed from the bar.

Present,

Feb. 22 1841.

THE LORD JUSTICE-CLERK.

LORDS MACKENZIE, MONCREIFF.

HER MAJESTY'S ADVOCATE—*Craufurd—J. T. Gordon*

AGAINST

PETER KERR OR CARR.—*C. G. Robertson.*

UTTERING BASE COIN.—STATUTE 2D WILLIAM IV. c. 34.—INDICTMENT.—Certain words struck out of an Indictment under the above statute, as not being warranted by its provisions.

PETER KERR or CARR was charged with contravention of the act 2d William IV. c. 34, § 7, by Uttering Base Coin, having at the time, 'or on the day' of such uttering, other base coin in his possession.

No. 97. Peter Kerr.

Uttering base coin.

C. G. ROBERTSON, for the pannel, objected to the relevancy of the Indictment, that the minor proposition did

No. 97. Peter Kerr, Feb. 22 1841.

Uttering base coin.

not set forth the crime exactly in the words of the statute, under which alone the charge was laid.

The Court allowed the Prosecutor to strike out the words 'or on the day;' and, as the Indictment expressly contained the statutory words, 'at the time,' the objection was repelled.

The pannel pleaded not guilty.

The Jury unanimously found him guilty.

In respect of which verdict of Assize, he was sentenced to be imprisoned in the prison of Edinburgh, for the period of eighteen calendar months.

March 12 1841.

Present,

THE LORD JUSTICE-CLERK,

LORDS MACKENZIE, MONCREIFF.

HER MAJESTY'S ADVOCATE.—*Sol.-Gen. Maitland—Davidson.*

AGAINST

JOHN CHRISTIE AND JAMES CHRISTIE.—*M'Neill—Russell—E. S. Gordon.*

BREACH OF TRUST AND EMBEZZLEMENT.—FALSEHOOD AND FRAUD—INDICTMENT.—Minutes of debate ordered on the relevancy of an Indictment for the above crimes, but the pannels subsequently tried and acquitted on a new indictment.

No. 98. John and James Christie.

Breach of Trust and Embezzlement.

JOHN and JAMES CHRISTIE were charged, along with GEORGE CHRISTIE, with Breach of Trust and Embezzlement, as also Falsehood and Fraud,

IN SO FAR AS, the said John Christie and James Christie having been, in or about January 1838, appointed agents at Golspie, in the shire of Sutherland, for the branch at Golspie aforesaid, of the banking company then and now or lately carrying on business in or near Aberdeen, under the title of the Aberdeen Town and County Banking Company,

No. 98. John and James Christie, March 12 1841.

Breach of Trust and Embezzlement.

or under some similar title, and having been empowered and entrusted as agents aforesaid, by the said banking company, to receive in name, or on account of the said banking company, payments of money in cash, bank and bankers' notes, checks, bills, orders, *or otherwise*, made into the said branch of the said banking company, under the obligation duly to enter the same in the book or books of the said branch of the said banking company, and as agents aforesaid, to hold the money so paid as aforesaid, for the said banking company, or to employ the same for behoof of the said banking company, in managing and conducting the business and affairs of the said branch of the said banking company, and not for their own uses and purposes, and duly to account for the same to the said banking company, or to the cashier and the directors thereof, or one or more of them, or other person or persons on behalf of the said banking company; and having acted as agents aforesaid from about January 1838 till about the beginning of July 1840; and the said George Christie having been appointed by the said John Christie and James Christie, or one or other of them, accountant or clerk, or at least having, during the said period or part thereof, acted as accountant or clerk, or in some other similar situation of trust and responsibility in the said branch of the said banking company, under the said banking company, and under the said John Christie and James Christie, as agents empowered and entrusted as aforesaid, or under one or more of them, and being in the full knowledge of the trust reposed in the said John Christie and James Christie, and of the duty and obligation incumbent on them, as aforesaid; and being himself, in virtue of the trust reposed in him as accountant or clerk, or acting in some similar situation as aforesaid, under the obligation duly to enter in the book or books of the said branch of the said banking company, payments of money in cash, bank and bankers' notes, checks, bills, orders, *or otherwise*, made into the said branch of the said banking company, and to hold the money so paid for the said banking company, or in so far as he had power and authority to employ the same for behoof of the said banking company in the business and affairs of the said branch of the said banking company, and not for his own uses and purposes, or those of the said John Christie and James Christie, or either of them; and various payments of money in cash, bank and bankers' notes, checks, bills, orders, *or otherwise*, having been at various times between the said month of January 1838, and the month of July 1840, made by various persons into, and lodged with, the said branch of the said banking company, at or near the office of the said branch at or near Golspie foresaid, the said John Christie, James Christie, and George Christie, all and each, or one or more of them, falsely, fraudulently, wickedly, and feloniously, and in breach of the trust reposed in the said John Christie and James Christie as aforesaid, and in breach of the trust reposed in the said George Christie as aforesaid, or in breach of one or other of the said trusts, did, then and there, or at some other times and places to the Prosecutor unknown, fail duly to enter in the book or books of the said branch of the said banking

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company the said payments of money made as aforesaid, or part thereof, and did embezzle the money so paid, or part thereof, and appropriate the same to their own uses and purposes, and did fail duly to account for the same to the said banking company, or to any person acting on their behalf, and did thereby defraud the said banking company of the said money so paid, or part thereof, the said money so paid as aforesaid, being the property or in the lawful possession of the said banking company, or the said banking company being responsible and liable for the amount of the same to the various persons by whom, or on whose behalf the said payments of money had been made into and lodged with the said branch of the said banking company as aforesaid: More particularly, (1.) David Neish, now or lately residing in or near Golspie, in the shire of Sutherland, and now or lately accountant to, or in the employment of his Grace George Duke of Sutherland, or some other person or persons to the Prosecutor unknown, having, on or about the 29th day of June 1838, in or near the office, at or near Golspie aforesaid, of the said branch of the said banking company, paid into the said branch of the said banking company in name or on behalf of her Grace Elizabeth Duchess-Countess of Sutherland, now deceased, the sum of L.1751. 15s. 8d. or thereby in cash, and bank and bankers' notes, or one or more of them, *or otherwise*, the said John Christie, James Christie. and George Christie, all and each, or one or more of them, falsely, fraudulently, wickedly, and feloniously, and in breach of the trust reposed in the said John Christie and James Christie as aforesaid, and of the trust reposed in the said George Christie, as aforesaid, or of one or other of the said trusts, did, time and place above libelled, or at some other time and place to the Prosecutor unknown, fail duly to enter in the cash-book and deposit-account ledger, or one or other of them, or other books or book of the said branch of the said banking company, the said sum of L.1751. 15s. 8d. or thereby, but did enter or cause to be entered in the said book or books, or one or more of them, the sum of L.151. 15s. 8d. or thereby only, or some similar sum, and did embezzle part of the said sum of L.1751. 15s. 8d. or thereby, amounting to the sum of L.1600 or thereby, and did fail duly to account for the same to the said banking company, or to any person on their behalf, and did appropriate the same to their own uses and purposes; and did thereby defraud the said banking company of the same; the said sum of L.1600 or thereby being the property or in the lawful possession of the said banking company, or for which the said banking company were responsible and liable to the said Elizabeth Duchess-Countess of Sutherland and to the said David Neish, or one or other of them: Farther, (2.) James Davidson, now or lately residing in or near Golspie aforesaid, and now or lately cashier to, or in the employment of, his Grace George Duke of Sutherland, or some other person or persons to the Prosecutor unknown, having, on or about the 30th day of July 1838, in or near the office aforesaid of the said branch of the said banking company, paid into the said branch of the said banking company, in the name or on

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behalf of the said Elizabeth Duchess-Countess of Sutherland, the sum of L.467. 6s. 5d. or thereby in cash, and bank and bankers' notes, or one or more of them, *or otherwise*, and the said David Neish, or some other person or persons to the Prosecutor unknown, having, time and place last above libelled, paid into the said branch of the said banking company, in the name or on behalf of the said Elizabeth Duchess-Countess of Sutherland, the sum of L.1187. 19s. 4d. or thereby in cash, and bank and bankers' notes, or one or more of them, *or otherwise*, the said John Christie, James Christie, and George Christie, all and each, or one or more of them, falsely, fraudulently, wickedly, and feloniously, and in breach of the trust reposed in the said John Christie and James Christie as aforesaid, and of the trust reposed in the said George Christie as aforesaid, or one or other of the said trusts, did, time and place last above libelled, or at some other time and place to the Prosecutor unknown, fail duly to enter in the said book or books aforesaid of the said branch of the said banking company, or one or more of them, the said sums of L.467. 6s. 5d. or thereby, and L.1187. 19s. 4d. or thereby, or one or other of the said sums, or the aggregate thereof, being the sum of L.1655. 5s. 9d. or thereby, but did enter, or cause to be entered in the said cash-book or other book the sum of L.655. 5s. 9d. or thereby only, or some similar sum, and did enter or cause to be entered in the said deposit-account ledger or other book the sums of L.467. 6s. 5d. and L.187. 19s. 4d. or thereby only, or one or other of the said sums, or some similar sum or sums, and did embezzle part of the said sum of L.1187, 19s. 4d. or thereby, or of the said sums of L.1187. 19s. 4d, or thereby and L.467. 6s. 5d. or thereby, amounting to the sum of L.1000 or thereby, and did fail duly to account for the same to the said banking company, or to any one on their behalf, and did appropriate the same to their own uses and purposes, and did thereby defraud the said banking company of the same; the said sum of L.1000 or thereby being the property or in the lawful possession of the said banking company, or the said banking company being responsible and liable for the same to the said Elizabeth Duchess-Countess of Sutherland, and the said James Davidson, and the said David Neish, or one or more of them: Farther, (3.) the said James Davidson, or some other person or persons to the Prosecutor unknown, having, on or about the 1st day of April 1840, in or near the office aforesaid of the said branch of the said banking company, paid into the said branch of the said banking company, in the name or on behalf of his Grace George Duke of Sutherland, the sum of L.4500 or thereby in cash, and bank and bankers' notes, or one or more of them, *or otherwise*, the said John Christie, James Christie, and George Christie, all and each, or one or more of them, falsely, fraudulently, wickedly and feloniously, and in breach of the trust reposed in the said John Christie and James Christie as aforesaid, and of the trust reposed in the said George Christie as aforesaid, or one or other of the said trusts, did, time and place last above libelled, or at some other time and

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place to the Prosecutor unknown, fail duly to enter in the book or books aforesaid of the said branch of the said banking company, or one or more of them, the said sum of L.4500 or thereby, but did enter or cause to be entered in the said book or books, or one or more of them, the sum of L.3000 or thereby only, or some similar sum, and did embezzle part of the said sum of L.4500 or thereby, amounting to the sum of L.1500 or thereby, and did fail duly to account for the same to the said banking company or to any person on their behalf, and did appropriate the same to their own uses and purposes, and did thereby defraud the said banking company of the same; the said sum of L.1500 or thereby, being the property or in the lawful possession of the said banking company, or for which the said banking company were responsible and liable to the said George Duke of Sutherland and to the said James Davidson, or one or other of them: Farther, (4.) Robert Horsburgh, now or lately residing at or near Tongue, in the parish of Tongue, and shire aforesaid, and now or lately factor to, or in the employment of his Grace George Duke of Sutherland, or some other person or persons to the Prosecutor unknown, having, on or about the 1st day of April 1840, in or near the office aforesaid of the said branch of the said banking company, paid into the said branch of the said banking company, in the name or on behalf of His Grace George Duke of Sutherland, the sum of L.329. 9s. 9d. or thereby in cash, and bank and bankers' notes, or one or more of them, *or otherwise*, the said John Christie, James Christie, and George Christie, all and each, or one or more of them, falsely, fraudulently, wickedly and feloniously, and in breach of the trust reposed in the said John Christie and James Christie as aforesaid, and of the trust reposed in the said George Christie as aforesaid, or of one or other of the said trusts, did, time and place last above libelled, or at some other time and place to the Prosecutor unknown, fail duly to enter in the book or books aforesaid of the said branch of the said banking company, or one or more of them, the said sum of L.239. 9s. 9d. or thereby, but did enter, or cause to be entered, in the said book or books, or one or more of them, the sum of L.39. 9s. 9d. or thereby only, or some similar sum, and did embezzle part of the said sum of L.239. 9s. 9d. or thereby, amounting to the sum of L.200 or thereby, and did fail duly to account for the same to the said banking company, or to any person on their behalf, and did appropriate the same to their own uses and purposes, and did thereby defraud the said banking company of the same; the said sum of L.200 or thereby, being the property or in the lawful possession of the said banking company, or for which the said banking company were responsible and liable to the said George Duke of Sutherland, and to the said Robert Horsburgh, or one or other of them: Farther, (5.) the said Robert Horsburgh, or some other person or persons to the Prosecutor unknown, having, in the name or on behalf of His Grace George Duke of Sutherland, on or about the 10th day of April 1840, transmitted from Tongue aforesaid, or from some other place to the Prosecutor unknown, to the said branch

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of the said banking company, or to the said John Christie, James Christie, and George Christie, or one or more of them, at Golspie aforesaid, the sum of L.1131. 11s. 1d. or thereby, in bank and bankers' notes, two orders, and a letter of credit, or one or more of them, *or other similar remittances*, with directions or in order that the said sum of L.1131. 11s. 1d. or thereby, should be placed to the credit of the said George Duke of Sutherland in the books of the said branch of the said banking company, and the said sum of L.1131. 11s. 1d. or thereby, transmitted as above libelled, having been duly received by the said John Christie, James Christie, and George Christie, or one or more of them, the said John Christie, James Christie, and George Christie, all and each, or one or more of them, did, on or about the 13th day of April 1840, in or near the office aforesaid of the said branch of the said banking company, or at some other time or place to the Prosecutor unknown, falsely, fraudulently, wickedly and feloniously, and in breach of the trust reposed in the said John Christie and James Christie as aforesaid, and of the trust reposed in the said George Christie as aforesaid, or of one or other of the said trusts, fail duly to enter in the book or books aforesaid of the said branch of the said banking company, or one or more of them, the sum of L.1131. 11s. 1d. or thereby, but did enter, or cause to be entered, in the said book or books, or one or more of them, the sum of L.131. 11s. 1d. or thereby only, or some similar sum, and did embezzle part of the said sum of L.1131. 11s. 1d. or thereby, amounting to the sum of L.1000. or thereby, and did fail duly to account for the same to the said banking company, or to any person on their behalf, and did appropriate the same to their own uses and purposes, and did thereby defraud the said banking company of the same; the said sum of L.1000. or thereby, being the property or in the lawful possession of the said banking company, or for which the said banking company were responsible and liable to the said George Duke of Sutherland and the said Robert Horsburgh, or one or other of them: FARTHER, (6.) the said Robert Horsburgh, or some other person or persons to the Prosecutor unknown, having, in the name or on behalf of His Grace George Duke of Sutherland, on or about the 24th day of April 1840, transmitted from Tongue aforesaid, or from some other place to the Prosecutor unknown, to the said branch of the said banking company, or to the said John Christie, James Christie, and George Christie, or one or more of them, at Golspie aforesaid, the sum of L.965. 19s. 10d. or thereby, in a bank order, *or other similar remittance or remittances*, with directions or in order that the said sum of L.965. 19s. 10d. or thereby, should be placed to the credit of the said George Duke of Sutherland in the books of the said branch of the said banking company, and the said sum of L.965. 19s. 10d. or thereby, transmitted as above libelled, having been duly received by the said John Christie, James Christie, and George Christie, or one or more of them, the said John Christie, James Christie, and George Christie, all and each, or one or more of them, did, on or about the 27th day

No 98. John and James Christie, March 12 1841.

Breach of Trust and Embezzlement.

of April 1840, in or near the office aforesaid of the said branch of the said banking company, or at some other time and place to the Prosecutor unknown, falsely, fraudulently, wickedly, and feloniously, and in breach of the trust reposed in the said John Christie and James Christie as aforesaid, and of the trust reposed in the said George Christie as aforesaid, or of one or other of the said trusts, fail duly to enter in the book or books aforesaid of the said branch of the said banking company, or one or more of them, the said sum of L.965. 19s. 10d. or thereby, but did enter, or cause to be entered, in the said book or books, or one or more of them, the sum of L.65. 19s. 10d. or thereby only, or some similar sum, and did embezzle part of the said sum of L.965. 19s. 10d. or thereby, amounting to the sum of L.900. or thereby, and did fail duly to account for the same to the said banking company, or to any person on their behalf, and did appropriate the same to their own uses and purposes, and did thereby defraud the said banking company of the same; the said sum of L.900. or thereby, being the property or in the lawful possession of the said banking company, or for which the said banking company were responsible and liable to the said George Duke of Sutherland, and the said Robert Horsburgh, or one or other of them: FARTHER, (7.) the said James Davidson, or some other person or persons to the Prosecutor unknown, having, on or about the 28th day of April 1840, in or near the office aforesaid of the said branch of the said banking company, paid into the said branch of the said banking company, in name or on behalf of His Grace George Duke of Sutherland the sum of L.536. 6s. 7d. or thereby, in cash, and bank and bankers' notes, or one or more of them, *or otherwise*, the said John Christie, James Christie, and George Christie, all and each, or one or more of them, falsely, fraudulently, wickedly, and feloniously, and in breach of the trust reposed in the said John Christie and James Christie as aforesaid, and of the trust reposed in the said George Christie as aforesaid, or of one or other of the said trusts, did, time and place last above libelled, or at some other time and place to the Prosecutor unknown, fail duly to enter in the book or books aforesaid of the said branch of the said banking company, or one or more of them, the said sum of L.536. 6s. 7d. or thereby, but did enter, or cause to be entered, in the said book or books, or one or more of them, the sum of L.36. 6s. 7d. or thereby only, or some similar sum, and did embezzle part of the said sum of L.536. 6s. 7d. or thereby, amounting to the sum of L.500. or thereby, and did fail duly to account for the same to the said banking company, or to any person on their behalf, and did appropriate the same to their own uses and purposes, and did thereby defraud the said banking company of the same; the said sum of L.500. or thereby, being the property or in the lawful possession of the said banking company, or for which the said banking company were responsible and liable to the said George Duke of Sutherland, and the said James Davidson, or one or other of them: FARTHER, (8.) James Brander, now or lately residing at or near Embo, in the parish of Dornoch, and shire aforesaid, having, on or about the

No. 98. John and James Christie, March 12 1841.

Breach of Trust and Embezzlement.

9th day of November 1838, paid into the said branch of the said banking company the sum of L.1155. 7s. 2d. or thereby, in cash, and bank and bankers' notes, or one or more of them, *or otherwise*, the said John Christie, James Christie, and George Christie, all and each, or one or more of them did, time last above libelled, in or near the office aforesaid of the said branch of the said banking company, or at some other time and place to the Prosecutor unknown, falsely, fraudulently, wickedly, and feloniously, and in breach of the trust reposed in the said John Christie and James Christie as aforesaid, and of the trust reposed in the said George Christie as aforesaid, or of one or other of the said trusts, fail duly to enter in the book or books aforesaid of the said branch of the said banking company, or one or more of them, the said sum of L.1155. 7s. 2d. or thereby, and did embezzle the said sum of L.1155. 7s. 2d. or thereby, and did fail duly to account for the same to the said banking company, or to any person on their behalf, and did appropriate the same to their own uses and purposes; and did thereby defraud the said banking company of the same; the said sum of L.1155. 7s. 2d. or thereby, being the property or in the lawful possession of the said banking company, or the said banking company being responsible and liable for the same to the said James Brander: OR OTHERWISE, the said James Brander having, on or about the 13th day of May 1840, paid into the said branch of the said banking company the sum of L.1200. or thereby, in cash, and bank and bankers' notes, or one or more of them, *or otherwise*, the said John Christie, James Christie, and George Christie, all and each, or one or more of them, did, time last above libelled, in or near the office aforesaid of the said branch of the said banking company, or at some other time and place to the Prosecutor unknown, falsely, fraudulently, wickedly, and feloniously, and in breach of the trust reposed in the said John Christie and James Christie as aforesaid, and of the trust reposed in the said George Christie as aforesaid, or of one or other of the said trusts, fail duly to enter in the book or books aforesaid of the said branch of the said banking company, or one or more of them, the said sum of L.1200. or thereby, and did embezzle the said sum of L.1200. or thereby, and did fail duly to account for the same to the said banking company, or to any person on their behalf, and did appropriate the same to their own uses and purposes, and did thereby defraud the said banking company of the same; the said sum of L.1200. or thereby, being the property or in the lawful possession of the said banking company, or the said banking company being responsible and liable for the same to the said James Brander.

George Christie having failed to appear, sentence of fugitation was pronounced against him.

The SOLICITOR-GENERAL, for the prosecution, moved that, in the meantime, the 8th charge be struck out of

No. 98. John and James Christie, March 12 1841.

the Indictment, on account of the illness of a material witness.

No objection being stated, the Court allowed that charge to be delete.

Breach of Trust and Embezzlement.

RUSSELL, for the pannels, objected to the relevancy of the Indictment. An undue latitude is taken by the Public Prosecutor, in the introduction of the words, '*or other-wise*,' in the 1st, 2d, 3d, 4th, and 7th charges, of the words, '*or other similar remittances*,' in the 5th charge, and of the words, '*or other similar remittance or remit-tances*,' in the 6th charge. The essence of the crime charged is, that while large sums were received, small sums only were entered in the books, and the balance appropriated and embezzled by the pannels. It is of the very essence of the charge that the receipts should be proved, and the manner of the receipts should be specifically set forth. If the words employed had been, '*or otherwise to the Prosecutor unknown*,' the objection would not have applied; but, in that case, if it had been proved that the Prosecutor knew, or, in law, must be presumed to have known the mode of payment, he could not have maintained that this charge was established.

The SOLICITOR-GENERAL and DAVIDSON, for the prosecution, answered,—The Indictment would have been good, if it had merely set forth, in each instance, that *a sum* was paid into the bank, and the pannel cannot complain because the Prosecutor has gone farther than he was bound to do. The embezzlement is not stated as to a specific thing or species of money.

M'NEILL, for the pannels, replied,—The words complained of ought to be struck out of the Indictment, as they are calculated to place the pannels at a disadvantage. The charge, in every instance, is that of embezzling part of a specific sum,—the words, 'part of the said sum' being used.

The Court ordered minutes of debate on the objection,

and continued the diet against the pannels till the 30th of May.[1]

No. 98. John and James Christie, March 12 1841.

NORTH CIRCUIT.

Spring 1841.

Breach of Trust and Embezzlement.

INVERNESS.

April 15 1841.

Judges.—LORDS MACKENZIE AND MEDWYN.

HER MAJESTY'S ADVOCATE—*Davidson.*

AGAINST

PETER CAMERON—*E. S. Gordon.*

MURDER—INDICTMENT.—Objection of undue latitude in setting forth the mode of death in a charge of Murder repelled.

PETER CAMERON was charged with Murder,

No. 99. Peter Cameron.

Murder.

IN SO FAR AS, on the 17th of October 1840, on or near to the road leading from the house at Crofthead of Ballintomb, in the parish of Knockan-

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[1] This Indictment was ultimately abandoned, and the pannels were tried on a new Indictment, on the 31st of May 1841. In the general narrative the words 'checks, bills, orders, or otherwise,' were altered to '*checks, bills, letters of credit, orders, and otherwise.*' In the 1st and 2d charges the words 'cash, and bank and bankers' notes, or one or more of them, or otherwise,' were altered to '*cash, bank and bankers' notes, an order, and a letter of credit, or one or more of them, or in some other mode or modes of payment, the particular mode or modes being to the Prosecutor unknown.*' In the third charge the same words were altered to '*cash, bank, and bankers' notes, orders, checks, and deposit receipts, or one or more of them, or in some other mode or modes of payment, the particular mode or modes being to the Prosecutor unknown.* In the 4th charge the words 'or otherwise' were altered to '*or in some other mode or modes of payment, the particular mode or modes being to the Prosecutor unknown.*' In the 5th, the words, 'or other similar remittances,' were altered to '*or other remittances, the particular remittances being to the Prosecutor unknown.*' And changes

No. 99. Peter Cameron, Inverness, April 15 1841.

Murder.

do, and shire of Elgin, then or lately before occupied by Alexander Tulloch, farmer, then or lately before residing there, now deceased, or from the vicinity of the said house towards, or past, or near to the Mansion-house of Knockando, in the parish of Knockando, and shire aforesaid, then and now or lately occupied, or partly occupied by Elizabeth Inkson or Beaton, or in which the said Elizabeth Inkson or Beaton then or lately resided, or towards or past the vicinity of the said mansion-house, and at or near to a part of the said road which is within 100 yards or thereby from the burn of Ballintomb, and on the west or right side of the said burn, or at some place or places on or near to the said road, at or near to that part thereof where the said burn of Ballintomb crosses the said road, or at some place or places on or near to the said road, between the said burn of Ballintomb and the said mansion-house of Knockando, or in the vicinity thereof, the particular place or places being to the Prosecutor unknown, the said Peter Cameron did wickedly and feloniously attack and assault the said Alexander Tulloch, and did, with a stick or some other weapon or weapons to the Prosecutor unknown, strike him several blows on or near his head, or other parts of his person, and did seize hold of him by the neck, and strangle or suffocate him, and did drag him towards the said burn of Ballintomb, and threw him into the said burn, whereby, or by some other violence to the Prosecutor unknown, then and there inflicted by him, the said Alexander Tulloch was strangled, or suffocated, or drowned, and otherwise mortally injured, and in consequence thereof, or part thereof, he immediately or soon thereafter died; and was thus murdered by the said Peter Cameron.

E. S. Gordon, for the pannel, objected to the relevancy of the Indictment, that an undue latitude was assumed in setting forth the mode of death.

The objection was repelled.

The pannel pleaded not guilty, and a proof was led, which, in the opinion of the Court, fully established his guilt of Murder.

The Jury unanimously found him guilty of Culpable Homicide.

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to the same effect were made in the remaining charges. This Indictment was found relevant without objection. The pannels pleaded not guilty. After a lengthened trial, the Jury found the libel not proven.

In respect of which verdict of Assize, he was sentenced to be transported beyond seas, for the whole period of his natural life.

No. 99. Peter Cameron, Inverness, April 15 1841.

Murder.

April 22 1841.

ABERDEEN.

Judges.—Lords Mackenzie and Medwyn.

Her Majesty's Advocate.—*Davidson.*

AGAINST

Jean Gordon or Bryan, James Robertson, and Mary White or Robertson.—*Carnegy Ritchie—John Murray.*

Prison-Breaking—Aggravation—Indictment.—An objection to the relevancy of an Indictment for prison-breaking, more especially when committed by means of setting fire to the doors or other part of a prison, repelled.

Jean Gordon, or Bryan, James Robertson, and Mary White, or Robertson, were charged with Prison-Breaking, more especially when committed by means of setting fire to the doors or other part of a prison,

No. 100. Jean Gordon or Bryan, and others.

Prison-breaking.

In so far as, the said Jean Gordon or Bryan having been apprehended on a charge of theft, or of reset of theft; and having been legally imprisoned in the prison of Banff, therein to be detained till brought to trial, or until otherwise liberated in due course of law, in virtue of a warrant granted on the 10th day of October 1840, by John Pringle, Esquire, sheriff-substitute of the shire of Banff, and the said James Robertson and Mary White or Robertson having been apprehended on a charge of theft, or other similar offence; and a warrant, dated Portsoy, 11th December 1840, having been granted by James Moir, Esquire, one of her Majesty's justices of the peace for the shire of Banff, to carry them to the said prison, therein to await examination; and having been, in virtue of the said warrant, legally imprisoned in the said prison, on the 12th day of December 1840, the said Jean Gordon or Bryan, James Robertson, and Mary White or Robertson being then prisoners in the said prison under the said warrants, against each of them respectively, as above libelled; and each of them well knowing that all and each of them were prisoners, the said Jean Gordon or Bryan, and Mary White or Robertson both and each, or one or other of them,

No. 100. Jean Gordon or Bryan, and others, Aberdeen, April 22 1841.

Prison-breaking.

wickedly and feloniously did burn a hole in the door of the cell or apartment of the said prison in which the said Jean Gordon or Bryan, and Mary White or Robertson were imprisoned, by means of a hot poker and a hot iron-bolt, or one or other of them, or by some other means to the Prosecutor unknown, and did then take off the padlock and chain which fastened the said door of the said cell or apartment on the outside thereof, and did then open the said door; and the said Jean Gordon or Bryan, and Mary White or Robertson, having thus got out of the said cell or apartment, did then, both and each, or one or other of them, force open the door of the cell or apartment of the said prison in which the said James Robertson was imprisoned, and adjoining to, or near the cell or apartment first above libelled, by breaking the padlock securing the same, or in some other way to the Prosecutor unknown; and in consequence thereof the said James Robertson escaped from the said cell or apartment last above libelled: and the said Jean Gordon or Bryan, James Robertson, and Mary White or Robertson, having, by the means aforesaid, wickedly and feloniously obtained access to an outer cell or apartment in the said prison, they did then, all and each, or one or more of them, wickedly and feloniously set fire to the door of the said outer cell or apartment, by placing against it a quantity of coals, and sticks, and oakum, or other substances, and then setting fire to the same; and the fire having communicated with, and taken effect upon the said door of the said outer cell or apartments, a great part of the said door was burned and consumed; and an aperture having been thus made in the said door, the said Jean Gordon or Bryan, James Robertson, and Mary White or Robertson did escape through the said aperture into the court of the said prison, and did then get upon and over a wall, forming part of the boundary of the said prison; by all which means, or part thereof, or by some other means to the Prosecutor unknown, the said Jean Gordon or Bryan, James Robertson, and Mary White or Robertson, did, all and each, or one or more of them, wickedly and feloniously break the said prison, and make their escape therefrom, and did immediately thereafter abscond.

MURRAY, for the pannels, objected to the relevancy of the Indictment, as substantially for prison-breaking, aggravated by having been committed by means of fire-raising. It is quite unprecedented to insert the higher crime as an aggravation.

LORD MACKENZIE.—I have very great doubts, indeed, whether the burning of a door, merely for the purpose of getting through, could be relevantly charged as the capital crime of fire-raising. At any rate, it is not so charg-

ed here. There was no intention on the part of the pannels to burn the prison. It cannot be maintained that the Prosecutor was bound either to have concealed the *modus operandi*, or to have charged the pannels with the capital crime.

No. 100. Jean Gordon or Bryan, and others. Aberdeen, April 22 1841.

Prison-breaking.

LORD MEDWYN having expressed his concurrence, the objection was repelled.

The pannels pleaded not guilty, and a proof was led.

The Jury, by a majority, found them guilty.

In respect of which verdict of Assize, the pannel, Jean Gordon or Bryan, was sentenced to be imprisoned for the period of four calendar months, from and after the expiration of a sentence of imprisonment already pronounced against her in a previous case for the crime of sheep-stealing: and the other pannels were sentenced to be imprisoned in the prison of Banff, for the period of four calendar months.

PERTH.

April 28 1841.

Judges—LORDS MACKENZIE AND MEDWYN.

HER MAJESTY'S ADVOCATE.—*Deas*

AGAINST

DAVID SMITH.—*Carnegy Ritchie.*

DECLARATION.—DEAF AND DUMB.—The declaration of a pannel born deaf and dumb sustained.

DAVID SMITH was charged with Theft, aggravated by having been committed by Opening Lockfast Places.

No. 101. Davd Smith.

Theft, &c.

He pleaded not guilty, and a proof was led.

CARNEGY RITCHIE, for the pannel, objected to the production of the declaration libelled on, in respect the

No. 101. David Smith, Perth, April 28 1841.

Theft, &c.

pannel was deaf and dumb, and therefore could neither answer the questions put to him, nor hear his answers read over in the usual way.

It appeared that the pannel had been born deaf and dumb, but that he had been educated at the institutions in London, Edinburgh, and Aberdeen, and could both read and write perfectly well. The Sheriff-substitute, before whom his declaration was emitted, had communicated his questions by writing on a slate, and received his answers in the same way; and the declaration thus obtained was then transcribed upon paper, and carefully read over and subscribed both by the pannel and the Sheriff.

In these circumstances, the Court repelled the objection.

The Jury found the pannel guilty.

In respect of which verdict of Assize, he was sentenced to be imprisoned in the jail of Dundee, for the period of six calendar months.

April 29 1841.

HER MAJESTY'S ADVOCATE—*Deas.*

AGAINST

WILLIAM MESSON.—*E. S. Gordon.*

CULPABLE HOMICIDE.—An objection to a charge of Culpable Homicide, committed by means of reckless driving, repelled.

No. 102. William Messon, Perth.

Culpable Homicide.

WILLIAM MESSON was charged with Culpable Homicide,

IN SO FAR AS, on the 12th of January 1841, the said William Messon, being then the driver of the Perth and Edinburgh mail coach, or other carriage, drawn by four horses, did culpably, recklessly, and unlawfully drive the said coach or other carriage and horses along that part of the public road leading from Kinross to North Queensferry, which is between the third mile stone from North Queensferry and Pinkerton

No. 102. William Messon, Perth, April 29 1841.

Culpable Homicide.

Bridge, both on or near the said road, whereby one or more of the said horses, or part of the said coach, or other carriage, came in contact with the person of Alexander Stein, carter, then residing in or near Millrow, in or near Inverkeithing, in the shire of Fife, and he was thereby thrown down upon the ground, and then struck and trampled on by the feet of one or more of the said horses, or, in some other way to the Prosecutor unknown, struck and injured by the said horses and coach or other carriage, or one or more of them, on or near his head, and in consequence thereof his skull was fractured, and he was mortally injured, and immediately expired; and was thus culpably killed by the said William Messon.

E. S. GORDON, for the pannel, objected to the relevancy of the Indictment, that the facts inferring culpability in the pannel, were not specifically enough set forth.

DEAS, for the prosecution, answered, — The specification given in the Indictment is sufficient for the ends of justice, and is sanctioned by numerous precedents[1] and by the analogy of other crimes.

The objection was repelled.

The pannel pleaded not guilty, and a proof was led.

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[1] One of these occurred in the course of this very circuit, at Aberdeen, where George Murray was convicted, and received a sentence of three months imprisonment, on an Indictment charging him with culpable homicide, IN SO FAR AS, on the 21st October 1840, the said George Murray having under his charge two carts, each cart drawn by one horse, and himself riding in one of the said carts, did culpably, negligently, and recklessly drive the said carts and horses along the high road leading from Stonehaven to Invercarron, in the parish of Dunnottar, and shire of Kincardine, in consequence whereof the wheel or other part of the foremost of the said carts, and the horse of the foremost of the said carts, or one or other of them, or one or more of the said horses and carts, did, on the said high road, and at or near that part thereof which is within a hundred yards of the Court-house situated in or near Stonehaven, and to the westward thereof, come in contact with the person of Jean Clark, then residing in or near the old town of Stonehaven, now deceased, whereby she was mortally injured in her chest, and ribs, and side, or other parts of her person, and died in consequence of the said injuries, on or about the 28th day of October 1840, and was thus culpably bereaved of life by the said George Murray.

No. 102. William Meeson, Perth, April 29 1841.

The Jury, by a large majority, found him not guilty.

In respect of which verdict of Assize, he was assoilzied *simpliciter*, and dismissed from the bar.

Culpable Homicide.

HIGH COURT.

May 17 1841.

Present,

THE LORD JUSTICE-CLERK.

***Judges.*—LORDS MEDWYN, COCKBURN.**

HER MAJESTY'S ADVOCATE.—*Sol.-Gen. Maitland—Crawford.*

AGAINST

THOMAS CROSBIE.—*W. E. Aytoun.*

MURDER—INDICTMENT—LOCUS DELICTI.—1. An objection founded on an alleged insufficient specification of the *locus delicti*, in a charge of Murder, repelled.

2. A pannel tried for the Murder of a Child of three days old, whose body had never been found; but the libel found not proven.

No. 103. Thomas Crosbie.

THOMAS CROSBIE was charged with Murder,

Murder.

IN SO FAR AS, the said Thomas Crosbie being the father, or reputed father, of a female child, of which Elizabeth Sheriff, or M'Farlane, or Oates, wife of Peter Oates, labourer, now or lately residing in Bull's Close, Cowgate, Edinburgh, was the mother, and the said Thomas Crosbie having, on or about the 1st day of August 1840, and at or near to Jock's Lodge Toll-bar, near Edinburgh, obtained possession of the said child, or received the same from its said mother into his charge and custody, the said child being then three days old or thereby, he the said Thomas Crosbie did, on the night of the 1st or morning of the 2d day of August 1840, and at Duddingston Loch, in the county of Edinburgh, wickedly and feloniously throw the said child into the said loch, whereby it was drowned, and was thus murdered by the said Thomas Crosbie: OR OTHERWISE, time above libelled, and on or near the road leading from Jock's Lodge Toll-bar aforesaid to Duddingston, in the county of Edinburgh, or on or near the road leading from the said toll-

bar to Edinburgh, or on or near the road leading from the said toll-bar to Portobello, in the said county, or at some other place in or near, or in the vicinity of Edinburgh, to the Prosecutor unknown, the said Thomas Crosbie did wickedly and feloniously bereave the said child of life, by drowning or strangling the same, or in some other way to the Prosecutor unknown; and the said child was thus murdered by the said Thomas Crosbie; and the said Thomas Crosbie did then or thereafter conceal the body of the said child, and the same has never been found.

No. 103. Thomas Crosbie, May 17 1841.

Murder.

AYTOUN, for the pannel, objected to the relevancy of the Indictment, in respect there was no sufficient specification of the *locus delicti*. In the first part of the minor proposition, the crime is charged as having been committed "at Duddingston Loch, in the county of Edinburgh," which is not a small piece of water, but one of considerable extent. But the objection applies still more strongly to the alternative statement, where a latitude is taken, extending to "some other place, in or "near, or in the vicinity of Edinburgh, to the Prosecu-"tor unknown."

CRAUFURD, for the prosecution, answered,—that the Prosecutor had given all the information in his power as to the *locus delicti*, and that the latitude assumed was quite admissible, (Alison, vol. II. p. 273).

The objection was repelled. The pannel pleaded not guilty, and a proof was led.

The mother of the child proved that she gave it into the pannel's custody, at the time and place set forth in the Indictment. She had never seen it afterwards, and the pannel had made, both to her and to the police-officers by whom he was apprehended, unsatisfactory and contradictory statements as to where the child was. Two different prisoners, who were confined in jail with the pannel, deponed to his having confessed to them separately, that he had drowned the child; and one of them stated, that he understood this to have taken place 'somewhere about 'Duddingston Loch.'

No. 103. Thomas Crosbie, May 17 1841.

In these circumstances, the SOLICITOR-GENERAL gave up the case; and the Jury unanimously found the libel not proven.

Murder.

In respect of which verdict of Assize, the pannel was assoilzied *simpliciter*, and dismissed from the bar.

June 5 1841.

Present,

THE LORD JUSTICE-CLERK.

LORDS MEADOWBANK, MONCREIFF, MEDWYN.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Maitland—Craufurd.*

AGAINST

DAVID AND JANET GEMMELL.—*Mure.*

UNNATURAL TREATMENT OF A CHILD OF TENDER YEARS.—Two pannels, who pleaded guilty to a charge of 'cruel and unnatural 'treatment, and wilful and culpable neglect of a child of tender 'years by its parent or custodier, whereby such child is injured in 'person and health,' sentenced to four months imprisonment.

No. 104. David and Janet Gemmell.

Unnatural Treatment of a Child.

DAVID and JANET GEMMELL were brought before the Circuit Court of Justiciary, held at Ayr in April 1841, charged with Culpable Homicide, as also the Cruel and Unnatural Treatment, and Wilful and Culpable neglect of a child of tender years, by its parent or custodier, whereby such child is injured in person and health,

IN SO FAR AS, during the whole or part of the period between the 1st day of May and the 22d day of October 1840, and within the house at Mosshill then occupied by them, the said David Gemmell and Janet Gemmell did, both and each or one or other of them, wickedly and feloniously, cruelly and unnaturally, maltreat and abuse Margaret or Elizabeth Baird or Gemmell, aged about eleven years or thereby, a natural child, or reputed natural child of the said David Gemmell, then residing with, and under the custody, care, and protection of both and each or one or other of them, the said David Gemmell and Janet Gemmell, and did, both and each or one or other of them, during the whole or part of the period above libelled, wilfully, cruelly, and culpably, and

No. 104. David and Janet Gemmell, June 5 1841.

Unnatural Treatment of a Child.

in breach of their duty as custodiers of the said child, neglect to afford her such wholesome food, such decent clothing, and cleanly and comfortable accommodation as was necessary to her health, suitable to their condition in life, and within their power to have afforded: And they did, both and each or one or other of them, confine the said child sometimes in a loft, and at other times in a spence or closet, within their said house, and they, or one or other of them, did lock the door and keep the key of the said spence or closet while she was confined therein, and did allow no person access thereto, but did keep the said child confined and in solitude for long periods of time: And, in particular, they did, both and each or one or other of them, cruelly and unnaturally confine the said Margaret or Elizabeth Baird or Gemmell in solitude within the said spence or closet, and did suffer her to languish there for the last two months or thereby of the period above libelled, and did wilfully and culpably neglect to provide for her such comfortable clothing and accommodation, and to give such attention to the cleanliness of her person as was within their power, and necessary for her health, and did withhold from her sufficient wholesome food, and did wilfully and culpably neglect to procure or apply for medical assistance, notwithstanding the said child was, during the period last above libelled, much emaciated in person, and injured in health, and although their circumstances in life enabled them easily to have provided the food, clothing, cleanliness, and medical assistance proper and necessary for the said Margaret or Elizabeth Baird or Gemmell: And the said David Gemmell and Janet Gemmell did, both and each or one or other of them, on different occasions during the months of September and October 1840, above libelled, the particular time or times being to the Prosecutor unknown, and within their said house at Mosshill aforesaid, wickedly and feloniously, cruelly and unnaturally, assault the said Margaret or Elizabeth Baird or Gemmell, and did, with their fists or with a stick, or some other instrument to the Prosecutor unknown, strike her severely on the head and other parts of her body, by all which, or part thereof, the said Margaret or Elizabeth Baird or Gemmell was injured in person and health, and in consequence of their said cruel and unnatural treatment, and wilful and culpable neglect, she died on or about the 21st day of October 1840, and was thus bereaved of life, and culpably killed by the said David Gemmell and Janet Gemmell, or one or other of them, and did thereafter secretly bury the body of the said child in a field near the said house at Mosshill, occupied by them as aforesaid.

The pannels pleaded guilty of the minor charge, with the exception of striking the child as libelled, and of confining her in solitude for the period libelled.

In regard to the punishment to follow on this judicial

No. 104. David and Janet Gemmell, June 5 1841.

Unnatural Treatment of a Child.

confession, Lords Meadowbank and Moncreiff certified the case to the High Court of Justiciary.

A witness had been examined before the Circuit Court, in regard to the poverty of the pannels; and certificates of their previous good character were produced.

The Court took into consideration the fact, that the pannels had already suffered imprisonment for a considerable period.

They were accordingly sentenced to be imprisoned in the prison of Ayr, for the period of four calendar months.

June 7 1841.

Present,

THE LORD JUSTICE-CLERK.

LORDS MONCREIFF, MEDWYN.

HER MAJESTY'S ADVOCATE.—*Cranfurd—J. T. Gordon.*

AGAINST

JANET BROWN.— *Broun.*

UTTERING BASE COIN—STATUTE 2 WILL. IV. c. 34. § 7.—INDICTMENT.—1. A pannel being charged with contravention of the statute 2 William IV. c. 36, § 7, opinion indicated that it is not competent to libel in the minor proposition that she has been previously convicted of the "high crime and offence" set forth in the statute.

2. Question, whether an extract conviction purporting to be of the high crime and offence was admissible in evidence.

No. 105. Janet Brown.

Uttering base coin.

JANET BROWN was charged with contravention of the act 2d William IV. c. 34, entitled 'An act for consolidating and amending the laws against offences relating to the coin,' by which it is enacted, § 7,

'That if any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for

No. 105. Janet Brown, June 7 1841.

Uttering base coin.

'any of the King's current gold or silver coin, knowing the same to 'be false or counterfeit, every such offender shall, in England and Ire- 'land be guilty of a misdemeanour, and in Scotland of a crime and 'offence, and being convicted thereof, shall be imprisoned for any term 'not exceeding one year, and if any person shall tender, utter, or put 'off any false or counterfeit coin, resembling or apparently intended to 'resemble and pass for any of the King's current gold or silver coin, 'knowing the same to be false and counterfeit, and such person shall, 'at the time of such tendering, uttering, or putting off, have in his 'possession basides the false or counterfeit coin so tendered, uttered 'or put off, one or more piece or pieces of false or counterfeit coin re- 'sembling or apparently intended to resemble and pass for any of the 'King's current gold or silver coin, or shall either on the day of such 'tendering, uttering, or putting off, or within the space of ten days 'then next ensuing, tender, utter, or put off any more or other false 'or counterfeit coin resembling or apparently intended to resemble or 'pass for any of the King's current gold or silver coin, knowing the 'same to be false or counterfeit, any such offender shall in England and 'Ireland be guilty of a misdemeanour, and in Scotland of a crime and 'offence; and being convicted thereof, shall be imprisoned for any 'term not exceeding two years; and if any person who shall have been 'convicted of any of the misdemeanours or crimes and offences herein 'before mentioned, shall afterwards commit any of the said misdemea- 'nours and crimes or offences, such person shall in England and Ire- 'land be deemed guilty of felony, and in Scotland of a high crime and 'offence, and being convicted thereof shall be liable, at the discretion 'of the Court, to be transported beyond seas for life, or for any term 'not less than seven years, or to be imprisoned for any term not ex- 'ceeding four years.'

IN SO FAR AS, on the 23d March 1841, in or near the shop situated in or near Canongate of Edinburgh, then and now or lately occupied by David Nicolson, merchant there, the said Janet Brown did wickedly and feloniously tender, utter, or put off as genuine a false or counterfeit coin resembling or apparently intended to resemble or pass for a shilling piece of the Queen's current silver coin, knowing the same to be false or counterfeit, by then and there tendering or delivering the same to the said David Nicolson in payment of the price of three or some other small number of eggs, then purchased or proposed to be purchased by her: and the said Janet Brown has been previously convicted of the crime and offence first specified in the foresaid section of the act above libelled, and also of the high crime and offence specified in the foresaid section of the act above libelled.

BROUN, for the pannel, objected to that part of the minor proposition of the Indictment, which stated, as an aggravation of the principal charge, that the pannel had

No. 105. Janet Brown, June 7 1841.

Uttering base coin.

been previously convicted of the 'high crime and offence' specified in the statute. As there was no charge at common law, the Prosecutor was not entitled to go beyond the provisions of the act of Parliament libelled on. The act had created no such aggravation as that here charged.

The ADVOCATE-DEPUTE moved the Court to be allowed to delete these words, 'and also of the high crime 'and offence specified in the foresaid section of the act 'above libelled' from the Indictment. This was accordingly done, and an interlocutor of relevancy of the libel, 'as above limited,' pronounced.

In the course of the proof, and after a conviction for uttering base coin, under the first section of the statute had been proved against the pannel, without objection,

CRAUFURD, for the prosecution, proposed to found upon 'an extract or certified copy of a conviction of the 'high crime and offence specified in the aforesaid sec-'tion of the act above libelled, obtained against the 'said Janet Brown before the High Court of Justiciary, 'dated 27th May 1839, together with a certified copy 'of the relative indictment,' which had been libelled on as one of the articles to be produced in evidence against the pannel.

BROUN, for the pannel, objected that this document was inadmissible, in support of the only aggravation which was charged in the minor proposition of the libel, as now amended, viz, that she had been previously convicted of the '*crime* '*and offence* first specified in the foresaid section of the act 'above libelled.' The statute makes a clear distinction between the 'crimes and offences,' and the 'high crimes and offences' which it specifies. While a previous conviction of the former is declared, in express terms, to be an aggravation of the crime charged, the statute, so far from warranting, has expressly excluded the public Prosecutor from founding upon a previous conviction of the latter offence. The Indictment is not laid at common law, but entirely upon the statutory provisions. Now, while the statute provides

that certain previous convictions shall be considered as aggravating the guilt of the criminal, this effect is unquestionably limited to a previous conviction of the 'crimes 'and offences *before* mentioned,' thus excluding the 'high crime and offence' which is *after* mentioned. The legislature imposes severe pains upon those who have been previously convicted of the crimes and offences which it specifies, but it stops there—holding that when the criminal has suffered the just punishment which the law awards to the high crime and offence which he has committed, he should never again be called in question for the same.

CRAUFURD, for the prosecution, argued,—that the conviction founded upon was quite admissible under the words of the Indictment, and in terms of the statute. The essence of the aggravation is the commission of the offence; and it cannot be denied that the crime of which the pannel was convicted, under the conviction proposed to be proved, is *essentially* the same as that with which she is now charged.

The Court seemed to consider the point as one attended with considerable difficulty, but recommended to the Advocate-Depute to withdraw the conviction, which he accordingly did.

The Jury unanimously found the pannel guilty of the uttering libelled, and also guilty of having been previously convicted of the same offence of uttering, under the statute libelled.

In respect of which verdict of Assize, she was sentenced to be imprisoned in the Bridewell of Edinburgh, for the period of two years.

June 21
1841.

Present,

THE LORD JUSTICE-CLERK.

LORDS MONCREIFF, MEDWYN.

HER MAJESTY'S ADVOCATE.—*Davidson—J. T. Gordon.*

AGAINST

MARGARET PLENDERLEITH OR DEWAR.—*Young.*

DECLARATION—INDICTMENT.—It is not necessary, in regard to a declaration signed by the examining magistrate, in consequence of the pannel's inability to write, that the Indictment should set forth that that signature was adhibited in presence of the pannel, though it would be of importance if it were proved not to have been so done.

No. 106. Margaret Plenderleith or Dewar.

Theft, &c.

MARGARET PLENDERLEITH or DEWAR was charged with Theft, aggravated by previous conviction.

She pleaded not guilty, and a proof was led.

The Indictment set forth that 'you, the said Margaret 'Plenderleith or Dewar, having been apprehended and 'taken before George Tait, Esquire, Sheriff-substitute of 'the shire of Edinburgh, did, in his presence at Edinburgh, 'on the 23d day of April 1841, emit a declaration, which 'was subscribed by him, you having declared that you 'could not write.

YOUNG, for the pannel, objected to the production of the declaration libelled on, in respect it was not stated to have been subscribed in presence of the pannel.

The Court were of opinion, that the fair construction of the Indictment was, that the declaration was subscribed by the Sheriff at the time when it was emitted by the pannel, 'in his presence at Edinburgh,' but that, at all events, it is not necessary that the Indictment should bear that it was subscribed in presence of the pannel, though it would

be of importance if it were proved that it had not been so done.

No. 106. Margaret Plenderleith or Dewar, June 21 1841.

Theft, &c.

Proof was led that the declaration was in fact signed by the Sheriff-substitute in the pannel's presence.

The objection was accordingly repelled.

The proof having been concluded, the Jury found the pannel guilty.

In respect of which verdict of Assize, she was sentenced to be imprisoned in the Prison of Edinburgh, for the period of twelve calendar months.

Present,

July 26 1841.

LORDS MEADOWBANK, MACKENZIE, COCKBURN.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Maitland—Davidson.*

AGAINST

ISABELLA MURRAY and HELEN CARMICHAEL or BREMNER—*Broun.*

POSSESSION OF BASE COIN—STATUTE 2 WILLIAM IV. c.34. § 8.—ART AND PART.—Two pannels being charged with contravention of the Statute 2 William IV. c. 34. § 8, and the base coin having been proved to have been in the possession of one only, question whether the other pannel could be convicted as guilty, art and part, of the offence libelled.

ISABELLA MURRAY and HELEN CARMICHAEL or BREMNER, were charged with contravention of the Act 2d William IV. c. 34, entitled 'an Act for consolidating and amending the laws against offences relating to the coin,' by which it is enacted, § 8,

No. 107. Isabella Murray and Helen Carmichael or Bremner.

Possession of base coin.

'That if any person shall have in his custody or possession three or 'more pieces of false or counterfeit coin, resembling, or apparently in- 'tended to resemble or pass for any of the King's current gold or silver

No 107. Isabella Murray and Helen Carmichael or Bremner, July 26 1841.

'coin, knowing the same to be false or counterfeit, and with intent to 'utter or put off the same, every such offender shall, in England and 'Ireland, be guilty of a misdemeanour, and in Scotland of a crime 'and offence; and being convicted thereof, shall be liable, at the dis-'cretion of the court, to be imprisoned for any period not exceeding 'three years,"

Possession of base coin.

In so far as, on the 15th day of June 1841, in or near the house situated in or near Boswell's Court, in or near College Wynd of Edinburgh, occupied by Hugh Walker, shoemaker, the said Isabella Murray and Helen Carmichael or Bremner, had both and each or one or other of them, in their custody or possession, seven or thereby pieces of false or counterfeit coin, each resembling or apparently intended to resemble or pass for a shilling piece of the Queen's current silver coin, they knowing the same to be false or counterfeit, and with intent to utter or put off the same.

The pannels pleaded not guilty, and a proof was led. It appeared that none of the coins were found upon Carmichael, but that all of them were discovered in the possession of Murray, in whose company she was. The policeman who detected the base money upon the person of Murray, swore that Carmichael placed herself before her, as if she wished to screen her companion.

Broun, for the pannel Carmichael, argued—that the Prosecutor had failed in making out against her the 'custody or possession' of the false coin libelled. The ordinary charge of Art and Part is here of no avail, as the accession, which is necessary to warrant a conviction of this statutory offence, must be such as to amount to a constructive possession upon the part of the accessory. In this case there was no proof of any kind against Carmichael.

Lord Meadowbank charged the Jury, directing them, that in order to constitute the statutory offence libelled, there must be possession, either actual or constructive; and that as none of the coins had been found in the actual custody of Carmichael, it was for them to determine whether she was in the possession of them through the other pannel,—whether the possession of Murray was her possession. This is a difficult question. By § 21 of the

No. 107. Isabella Murray and Helen Carmichael or Bremner, July 26 1841.

Possession of base coin.

statute, it is declared, that 'when the having any matter 'in the custody or possession of any person, is in this act 'expressed to be an offence, if any person shall have any 'such matter in his personal custody or possession, or 'shall knowingly and wilfully have such matter in any 'dwelling house, or other building, lodging, apartment, 'field, or other place open or enclosed, whether belonging 'to, or occupied by himself or not, and whether such 'matter shall be so had for his own use or benefit, or for 'that of another, every such person shall be deemed, and 'taken to have such matter in his custody or possession, 'within the meaning of this act;' and this part of the act creates great doubt as to the present case. Had this been an offence at common law, a conviction of art and part might have been warranted, but, seeing that the charge is a statutory one, and that the statute seems to be directed against *personal* possession only, the safest course for the jury, unless they hold that to be proved, is to acquit the pannel Carmichael.

The Jury accordingly found the pannel, Isabella Murray, guilty as libelled; and the libel against the pannel, Helen Carmichael or Bremner, not proven.

In respect of which verdict of Assize, the pannel, Helen Carmichael or Bremner, was assoilzied *simpliciter* and dismissed from the bar; and the pannel, Isabella Murray, was sentenced to be imprisoned in the prison of Edinburgh, for the period of eighteen calendar months.

NORTH CIRCUIT.

Autumn 1841.

Sept. 23 1841.

PERTH.

Judges—LORDS MONCREIFF AND COCKBURN.

HER MAJESTY'S ADVOCATE.—*Urquhart.*

AGAINST

JOHN REID.—*Maitland Heriot.*

UTTERING A FORGED BILL.—Question, whether the presentation of a Bill of Exchange bearing a forged subscription of a party as acceptor, to another person, to be signed by him as drawer and indorser, can be relevantly charged as an act of uttering a forged bill.

No. 108. John Reid.

Forgery, &c.

JOHN REID was charged with Forgery, as also the wickedly and feloniously using and uttering as genuine any Forged Bill of Exchange, or other obligatory writing, having thereon any forged subscription, knowing the same to be forged:

'IN SO FAR AS, the said John Reid having written, or procured to be 'written, a bill for L.49. 19s. sterling, bearing to be dated, 'Logie, 8th 'January 1840,' and to be payable four months after date, and to be 'addressed 'To Mr. David Husband, Easter Forest, and Mr. John 'Reid, teacher, Logie,' the said John Reid did, upon the 8th day of January 1840, within the house at Logie, in the parish of Logie and shire of Fife, occupied by him the said John Reid, or at some other time and place within the shire of Fife to the Prosecutor unknown, wickedly and feloniously forge and adhibit, or cause and procure to be forged and adhibited upon the said bill, the subscription, 'David Hus-'band,' as one of the acceptors of said bill, intending the same to pass for, and to be received as, the genuine subscription of David Husband, senior, then and now or lately farmer, Easter Forest, in the parish of Logie aforesaid, or of some other person of the name of David Husband to the Prosecutor unknown, or being a wholly false and fictitious subscription; Farther, the said John Reid having subscribed his own name upon the said bill, as a joint acceptor thereof, did, upon the 8th day of

No. 168. John Reid, Perth, Sept. 23 1841.

Forgery, &c.

January 1840, within the house situated at Conivie, in the parish of Logie aforesaid, occupied by David Reid farmer there, wickedly and feloniously use and utter as genuine the said forged bill, having thereon the said false, forged, and counterfeited subscription of the said David Husband, well knowing the same to be false, forged, and counterfeited, and his own signature adhibited to it, by then and there presenting the same to the said David Reid, and did request him to put his name to the said bill as drawer and indorser thereof; and the said David Reid, believing the said forged subscription upon the said bill to be the genuine subscription of the said David Husband, he the said David Reid did then and there subscribe the said bill as the drawer and indorser thereof, and did then deliver it back to the said John Reid: Farther, upon the 9th January 1840, within the banking office of the Branch of the British Linen Company at Cupar, in the county of Fife, the said John Reid did wickedly and feloniously use and utter as genuine the foresaid forged bill of exchange, having the said false, forged, and counterfeited subscription thereon, he well knowing the same to be false, forged, and counterfeited, by then and there delivering the same, or causing it to be delivered to George Christie, one of the agents of said branch of the British Linen Company, then residing in Cupar, in the parish of Cupar, and county aforesaid, or to John Ritchie, then teller now or lately accountant in the office of the said branch banking company, and then residing in Cupar aforesaid, or to some other person in the said banking-office to the Prosecutor unknown, in order that the said forged bill might be discounted, and the sum therein contained, or part thereof, placed to his credit and applied for his behoof, in payment, or part payment of another bill then due to the said British Linen Company or to the said George Christie, and to William Pagan, then residing in or near Cupar aforesaid, also one of the agents of the said branch of the British Linen Company, or to one or other of them, for L.49. 19s. 7d., dated 2d September 1839, payable four months after date, and accepted by the said John Reid, and bearing also to be subscribed by David Reid as drawer and indorser, and by David Husband, as joint acceptor, along with the said John Reid, and the said forged bill was discounted, and the sum contained in it, or part thereof, was so applied at the said bank office accordingly.

MAITLAND HERIOT, for the pannel, objected to the relevancy of the Indictment, that the *species facti* libelled in regard to the delivery to Reid, did not amount to a relevant charge of uttering. The pannel might have defrauded the drawer by presenting the piece of paper containing the alleged fictitious signature, obtaining from him his name as drawer, and after that getting

No. 108. John Reid, Perth, Sept. 23 1841. Forgery, &c.

it back,—then, to be sure, but not till the drawer's signature was added, a proper bill of exchange;—he might have imposed upon him; but, by so doing, he was not guilty, either of the crime of *uttering*, (Alison, Vol. II. pp. 371, 402, 418), or, at any rate, of that of uttering a 'forged 'bill.'

URQUHART, for the prosecution, answered, — The pannel is charged with uttering the bill, 'having there- 'on the said false, forged, and counterfeit subscription.' The crime of uttering was completed by delivering it to the drawer as libelled. But, even supposing it were not, that charge, taken in connection with, and as narrative to the subsequent charge, amounts to a relevant charge of uttering.

LORDS MONCREIFF and COCKBURN certified the case to the High Court of Justiciary.[1]

SOUTH CIRCUIT.

Sept. 20 1841.

Autumn 1841.

AYR.

Judges.—THE LORD JUSTICE-CLERK AND LORD MACKENZIE.

HER MAJESTY'S ADVOCATE—*Milne.*

AGAINST

ROBERT FULTON, JUNR.—*Young.*

RAPE—DECLARATION.—1. A boy, under the age of fourteen, convicted of the crime of rape, and sentenced to fifteen years transportation.

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[1] No farther proceedings took place under this Indictment; but the pannel was brought to trial in the High Court, on the 8th of January 1842, under a new Indictment, which *narrative* stated the presentation

2. An objection to the declaration of a pannel that it bore to be 'written on this and the six preceding pages,' whereas it consisted but of six pages in all, repelled.
3. It is no objection to a declaration, that the pannel, when emitting it, was, besides being informed that he was not bound to answer the questions put to him, told that he ought to speak the truth, and tell no lies.

No. 109. Robert Fulton, Junior, Ayr, Sept. 20 1841. — Rape.

ROBERT FULTON, junior, was charged alternatively with Rape, or Assault with intent to Ravish, committed on a girl aged about five years and eleven months.

1. He pleaded not guilty; and special defences were lodged for him, to the effect that having been under the age of fourteen at the time when the crime charged against him is said to have been committed, he must be held in law incapable of committing a rape. For though in other felonies *malitia supplet ætatem*, yet as to this particular species of felony the law supposes an imbecility of body as well as of mind.[1] With these defences the pannel pro-

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of the bill to David Reid, and his having subscribed it as drawer and indorser, and delivered it back to the pannel, and set forth as the single act of uttering, the presentation of it at the bank. The pannel was found guilty, and sentenced to seven years transportation.

[1] See Blackstone, Book IV. c. 15. Hale's Pleas of the Crown, Vol. I. p. 630. Russell on Crimes, Vol. I. p. 557. Beck's Medical Jurisprudence, page 101. Smith's Principles of Forensic Medicine, p. 407. The law of England on this point seems to have settled that 'if it be 'proved that the defendant is under the age of fourteen years, he must 'be acquitted, *whatever may be the nature of the evidence against him*, 'for a boy under the age of fourteen years is presumed by law incap-'able to commit a rape.' (Archbold's Summary, 6th edition, p. 405.) See the case of Rex *v.* Eldershaw, March 19, 1828. 3 Carrington and Payne, p. 396. In the case of Rex *v.* Philips, at the Oxford Assizes, 1839. (7. Carrington and Payne, p. 736.) Justice Pattison expressly stated to the Jury, 'I think that the prisoner could not, in point of 'law, be guilty of the offence of assault, with intent to commit a rape, 'if he was at the time of the offence under the age of fourteen. And 'I think, also, that *if he was under that age, no evidence is admissible 'to show that in point of fact he could commit the offence of rape.*' It has also been decided by Justice Gaselee, with the concurrence of the

No. 109. Robert Fulton, Junior, Ayr, Sept. 20 1841. ——— Rape.

duced a medical certificate, to the effect that his organs of generation had not yet undergone the changes which constitute puberty, and gave notice of his intention to examine Dr. James Syme, residing in Ayr, to prove this certificate.

2. In the course of the proof—

YOUNG, for the pannel, objected to the production of the declaration libelled on, in respect the docquet annexed to it bore that the declaration referred to was 'written on 'this and the six preceding pages,' whereas that produced extended only to the sixth page.

This objection was repelled.

3. The Procurator-Fiscal for the county, who was one of the witnesses to the declaration, deponed that he had told the pannel that he was not bound to answer the questions put to him, but that he ought to speak the truth, and tell no lies.

Chief Baron (Lord Abinger), that the presumption of law on this subject is not affected by the statute 9th Geo. IV. c. 31, dispensing with proof of emission, (Rex *v.* Groombridge, Guildford Assizes, 1839. 7. Carrington and Payne, p. 582.) It is observed by Mr Phillipps, in reference to these cases, that 'the rule seems to be laid down as if no 'proof could be admitted to the contrary of the presumption. *It does 'not appear whether in any case such proof has been tendered.* Medical 'experience shews that the presumption is not always according to fact 'and truth.' (Phillipps on Evidence, 8th edition, p. 462.) But in a late case, which was tried before Mr. Baron Gurney, the report expressly bears, '*The commission of the fact was proved*, but it appeared 'that the prisoner was under fourteen years of age, and on that account 'the learned judge directed the jury to acquit of the rape, but left it to 'them to find the prisoner guilty of an assault, under the statute 1st 'Victoria, c. 85, § 11.' The judgment was respited, to obtain the opinion of all the Judges, But the only question raised regarded the competency of the conviction for the common assault, no doubt being apparently entertained that 'the law considered the prisoner, on account 'of his nonage, incapable of committing a rape,' (Rex *v.* Brimilow, Hilary Term, 1840. 2. Moody's Crown Cases reserved, p. 122.)

YOUNG, for the pannel, objected to the declaration being received in such circumstances. A person in authority telling a prisoner of such tender years that he ought to speak the truth, amounts to an advice, that it would be better for him to do so, which has been held sufficient to cast a declaration. (Alison, Vol. 2. p. 562.)

THE LORD JUSTICE-CLERK.—I do not think that what was said to the pannel was sufficient to cast this declaration.

LORD MACKENZIE.—The advice was to speak the truth, and tell no lies. I cannot say that even an accused party has an absolute right to tell lies. It was explained to him that he was not bound to answer the questions put.

The objection was accordingly repelled, and the declaration read.

The completion of the principal crime charged was fully established by the evidence of the girl—by proof of the account which she had given of the matter *de recenti*—by medical testimony as to the injuries she had sustained,—and by the pannel's confession of guilt at the period of his apprehension.

A medical witness, examined in exculpation, corroborated the statement in the certificate produced with the defences, that the pannel had not yet attained to puberty. He stated various particulars, from which he was satisfied, on an examination of the pannel's person, that this was the case; but he declined to state that he considered it impossible for him to commit the crime of rape, it being understood that *penetratio* is alone necessary to constitute that crime. No farther evidence was produced as to the pannel's age, which was averred to be at present fourteen years and two months, or thirteen and ten months at the date of the crime libelled.

The Jury, with the concurrence of the Court, unani-

No. 109. Robert Fulton, Junior, Ayr, Sept. 20 1841.

Rape.

mously found the pannel guilty of rape, but, on account of his youth, recommended him to the lenity of the Court.

In respect of which verdict of Assize, he was sentenced to be transported beyond seas, for the period of fifteen years.

HIGH COURT.

Nov. 5 1841.

Present,

THE LORD JUSTICE-CLERK.*

LORDS MONCREIFF, MEDWYN.

HER MAJESTY'S ADVOCATE—*Lord-Advocate Rae*†—*Urquhart.*

AGAINST

MARY WHITE.—*F. Russell.*

UTTERING BASE COIN—STAT. 2 WILLIAM IV. c. 34. § 7—INDICTMENT—PREVIOUS CONVICTION.—A pannel having been charged, both at common law, with the offence of uttering base coin, aggravated by previous convictions, and also with contravention of the statute 2 William IV. c. 34, § 7, held competent to libel a previous conviction of the high crime and offence created in the statute, as a common law aggravation of the principal charge.

No. 110. Mary White.

Uttering base coin.

MARY WHITE was charged with the wickedly and feloniously Using and Uttering as genuine any False or

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* On the 25th of October 1841, John Hope Esquire, late Dean of the Faculty of Advocates, appeared in Court, and produced a commission, granted by her Majesty, nominating and appointing him to be Lord Justice-Clerk, in room of the right Honourable David Boyle of Shewalton, appointed to the office of Lord Justice-General of Scotland, and also Lord President of the Court of Session; after reading and recording of which commission, the said John Hope qualified himself to Her Majesty, by taking and swearing the oaths of allegiance and abjuration, and subscribing the same with the assurance; and having given his oath *de fideli administratione officii*, he was thereupon admitted and received as Lord Justice-Clerk, and took his seat accordingly.

† On the 9th of September 1841, the Right Honourable Sir William Rae, Baronet, presented to the Court a commission, nominating and

Counterfeit Coin, resembling or apparently intended to resemble, or pass for, the current coin of this realm, knowing the same to be false or counterfeit, especially when committed by a person who has been previously convicted of the said crime: AS ALSO, with contravention of the act 2d William IV. c. 34, entitled, 'An Act for 'Consolidating and Amending the Laws against offences 'relating to the Coin,' by which it is enacted, § 7,'

No. 110. Mary White, Nov. 5 1841.

Uttering base coin.

'That, if any person shall tender, utter, or put off, any false or counterfeit coin, resembling, or apparently intended to resemble, or pass 'for, any of the King's current gold or silver coin, knowing the same 'to be false or counterfeit, every such offender shall, in England and 'Ireland, be guilty of a misdemeanour, and in Scotland of a crime and 'offence; and, being convicted thereof shall be imprisoned for any term 'not exceeding one year; and if any person shall tender, utter, or put 'off, any false or counterfeit coin, resembling, or apparently intended 'to resemble, or pass for, any of the King's current gold or silver coin, 'knowing the same to be false or counterfeit, and such person shall, 'at the time of such tendering, uttering, or putting off, have in his 'possession, besides the false or counterfeit coin so tendered, uttered, or 'put off, one or more piece or pieces of false or counterfeit coin, resembling, or apparently intended to resemble, or pass for, any of the 'King's current gold or silver coin, or shall, either on the day of such 'tendering, uttering, or putting off, or within the space of ten days 'then next ensuing, tender, utter, or put off, any more or other false or 'counterfeit coin, resembling, or apparently intended to resemble, or 'pass for, any of the King's current gold or silver coin, knowing the 'same to be false or counterfeit, every such offender shall, in England 'and Ireland, be guilty of a misdemeanor, and, in Scotland, of a crime 'and offence, and, being convicted thereof, shall be imprisoned for any 'term not exceeding two years; and, if any person, who shall have 'been convicted of any of the misdemeanors or crimes and offences, 'herein before mentioned shall afterwards commit any of the said misde-'meanors or crimes and offences, such person shall, in England and

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appointing him to the office of Her Majesty's Advocate, which having been recorded, he qualified himself by taking the necessary oaths, and was thereupon received in Court as Her Majesty's Advocate. Duncan M'Neill, Esquire, Advocate, was, at the same time, appointed to the office of Solicitor-General, and was received as such, in Court, on the 15th of September 1841.

No. 110. Mary White, Nov. 5 1841.

'Ireland, be deemed guilty of felony, and in Scotland *of a high crime* '*and offence*, and, being convicted thereof, shall be liable, at the dis-'cretion of the Court, to be transported beyond the seas for life, or 'for any term not less than seven years, or to be imprisoned for any 'term not exceeding four years.'

Uttering base coin.

The Indictment, after quoting this section of the statute, continued: 'Yet true it is and of verity, that you the said Mary White are guilty of the said crime at common law, aggravated as aforesaid, and of the crime and offence first set forth, and of the high crime and offence set forth in the before recited section of the said statute, or of one or more of them, actor, or art and part:'

IN SO FAR AS, on the 30th day of July 1841, or one or other of the days of that month, or of June immediately preceding, or of August immediately following, within the shop situated in Nicolson Street, in or near Edinburgh, then and now or lately occupied by Peter Pollock, hosier there, then and now or lately residing in Chapel Street, in or near Edinburgh, you the said Mary White did wickedly and feloniously tender, utter, or put off, as genuine, a false or counterfeit coin, resembling, or apparently intended to resemble, or pass for, a shilling-piece of the Queen's current silver coin, you knowing the same to be false or counterfeit, by then and there delivering the same to Mary M'Lean or Pollock, wife of, and then and now or lately residing with, the said Peter Pollock, in payment of the price of a halfpenny worth of white tape, then purchased by you, you proposing to receive the balance in change: And you the said Mary White have been previously convicted of the crime and offence first set forth, and of the high crime and offence set forth in the above recited section of the statute above libelled: And you the said Mary White having been apprehended and taken before George Tait, Esquire, Sheriff-substitute of Edinburghshire, you did, in his presence at Edinburgh, upon the 3d day of August 1841, emit a declaration, which was subscribed by him in your presence, you having declared that you could not write: Which declaration; as also the false or counterfeit coin above libelled; as also a certified copy of a libel, and of a conviction and sentence following thereon, obtained against you the said Mary White, under the name of Mary White or Murray, for the crime and offence first set forth in the before recited section of the said statute, before the Sheriff-substitute of the county of Edinburgh and a jury, dated the 9th day of June 1838; as also a certified copy of a libel or indictment, and a conviction and sentence following thereon, obtained against you the said Mary White, under the name of Mary White or Murray, for the high crime and offence set forth in the before

recited section of the said statute above libelled, before the High Court of Justiciary, dated the 5th day of November 1839, being to be used in evidence against you the said Mary White, at your trial, will, for that purpose, be in due time lodged in the hands of the clerk of the High Court of Justiciary, before which you are to be tried, that you may have an opportunity of seeing the same.

No. 110. Mary White, Nov. 5 1841.

Uttering base coin.

F. RUSSELL, for the pannel, objected to that part of the minor proposition, which stated, as an aggravation of the principal charge, that the pannel had been previously convicted of 'the high crime and offence set forth in the 'above recited section of the statute above libelled.' This aggravation cannot be sustained, either on the common law or under the statute, upon both of which the present Indictment is laid. It is not relevant to charge, as a common law aggravation, the recommission of a statutory crime, particularly as the offence which the pannel is charged with repeating might not be cognizable by a court of justice, independently of the statute,—as, for instance, the possessing of base coin, which is not a crime at common law. Moreover, the aggravation here charged is clearly referable to the statute, both from the plain meaning of the connecting words, and from the circumstance that the common law knows nothing of high crimes and offences. Taking it, then, as an aggravation, it is clearly incompetent, both the terms and spirit of the enactment excluding such a charge. Any argument, however, upon this head is rendered unnecessary, by the previous case of Janet Brown, High Court, June 7, 1841, *ante* p. 554, in which the public Prosecutor abandoned a similar aggravation.

URQUHART, for the prosecution, answered,—The present libel was framed expressly with a view to meet the objection, which was successful in the case of Janet Brown. While a previous conviction of the high crime and offence mentioned in this act of Parliament, cannot be charged as a statutory aggravation, it is a good aggravation at common law. The crime of uttering, of which the previous convictions are charged, is undoubtedly a

No. 110. Mary White, Nov. 5 1841.

Uttering base coin.

common law offence, and therefore capable of aggravation at common law. The 8th section of the statute, which declares the possession of base coin to be a crime, is not founded on in the libel, and can have no bearing upon the point under discussion.

LORD MONCREIFF.—There is clearly no warrant for such an aggravation in the statute, but it certainly aggravates the guilt of a prisoner charged with uttering counterfeit coin, that he has been previously convicted of the same *species facti*, though under the statutory denomination. The aggravation, therefore, must be good at common law.

LORD MEDWYN.—I am of the same opinion.

The LORD JUSTICE-CLERK.—I have some difficulty in the matter, but, on the whole, am inclined to concur.

The objection was accordingly repelled. The pannel pleaded guilty of the using and uttering libelled at common law, aggravated by the previous conviction of 5th November 1839.

In respect of which judicial confession, she was sentenced to be transported beyond seas, for the period of seven years.

HER MAJESTY'S ADVOCATE—*Lord-Advocate Rae—Urquhart.*

AGAINST

ALISON PUNTON.—*B. R. Bell.*

CONCEALMENT OF PREGNANCY—INDICTMENT—ART AND PART—EVIDENCE—PRODUCTION—1. The charge of art and part held to be properly omitted in an Indictment for concealment of pregnancy.

2. An extract from the records of a kirk-session, written on one sheet, and authenticated by the subscription of the clerk on the last page, found to be admissible in evidence.

3. An objection to medical evidence, in respect the animal substance to which it referred had not been preserved and produced, repelled.

4. Held that it was not necessary, in a charge of concealment of pregnancy, to libel on the birth of 'a *full grown* child;' but that such a state of the fact, if averred in the Indictment, must be proved.

No. 111. Alison Punton, Nov. 5 1841.

Concealment of pregnancy.

ALISON PUNTON was charged with Contravention of the statute 49th Geo. III. c. 14. The Indictment against her bore:

That albeit, by an act passed in the forty-ninth year of the reign of his late majesty King George III. cap. 14, entitled, 'An Act for repealing 'an act of the Parliament of Scotland relative to child-murder, and for 'making other provisions in lieu thereof;' it is enacted, 'That if, from 'and after the passing of this act, any woman in that part of Great 'Britain called Scotland shall conceal her being with child during the 'whole period of her pregnancy, and shall not call for and make use of 'help or assistance in the birth; and if the child shall be found dead, 'or be amissing, the mother, being lawfully convicted thereof, shall be 'imprisoned for a period not exceeding two years, in such common jail 'or prison as the Court before which she is tried shall direct and 'appoint:' Yet true it is and of verity, that you the said Alison Punton, junior, are guilty of the said crime:

IN SO FAR AS, on the 26th day of September 1841, or on one or other of the days of that month, or of August immediately preceding, or of October immediately following, you the said Alison Punton, junior, did, within the house of Preston, in the parish of Preston-kirk, and county of Haddington, then occupied by Alison Punton, senior, your mother, or in the immediate vicinity of the said house, or at some other place to the Prosecutor unknown, bring forth a full grown child, but of what sex is to the Prosecutor unknown; and you did conceal your being with child during the whole period of your pregnancy, and did not call for, and make use of help or assistance in the birth; and the said child is amissing.

1. B. R. BELL, for the pannel, objected to the relevancy of the Indictment, that the minor proposition contained no charge of 'art and part,' the insertion of which is, by express statute, rendered imperative 'in all criminal libels.' (Statute 1592, c. 153. 9th Geo. IV. c. 29, § 9. Hume, Vol. 2. p. 230. Alison, Vol. 2. p. 250.)

The LORD ADVOCATE and URQUHART, for the prosecution, answered,—The object of the act 9th Geo. IV. c. 29, was to remove some difficulties which obstructed the course of justice in Scotland. It was not intended to introduce any new requisite, and accordingly, while it abo-

No. 111. Alison Punton, Nov. 5 1841.

Concealment of pregnancy.

lished the 'at least' clause in Indictments, it left the former law in regard to the charge of art and part untouched. But, even before the passing of this act, the provisions of the old Scottish statute in regard to this charge had been qualified, so as to apply to such crimes only as are capable of accession. Not only can no accession take place in concealment of pregnancy, but such a charge would be inconsistent with the principal offence libelled; and if inserted, might have been held to destroy the relevancy of the Indictment.

The objection was repelled.

The pannel pleaded not guilty, and a proof was led.

2. Among the productions libelled on was an 'Extract 'from the records of the Kirk-session of Preston-kirk re-'lative to the case of Alison Punton, 1841.'

The document in question contained the minute of a meeting of the Kirk-session, at which the pannel had been examined, and denied that she was with child.

The Session-clerk of the parish having been called to prove this extract—

B. R. Bell, for the pannel, objected, that the document was not a regular extract, as it was not signed by the clerk on every page. (Case of Hugh Fraser, Inverness, Sept. 19, 1839. Swinton, Vol. II. p. 436.)

The Court held that there was a distinction between the case of Fraser referred to, and the present, as the extract here consisted of one sheet only, and was properly authenticated on the last page.

The objection was accordingly repelled. The document was, however, ultimately withdrawn by the Prosecutor, upon an opinion being expressed by the Court that evidence as to the proceedings against the pannel before

he Kirk-session, and the statements then made by her, were liable to some objections, as a mode of proving the crime with which she was charged.

No. 111. Alison Punton, Nov. 5 1841.

3. A medical witness having deponed that he was convinced, on examination of the pannel, that she had given birth to something, and that he accordingly questioned her mother, who produced an after-birth,—

Concealment of pregnancy.

B. R. BELL, for the pannel, objected, that the after-birth referred to not having been produced, no evidence could be received regarding it. This is a most material part of the case against the pannel, since, upon the question whether this substance which was exhibited to the medical witnesses was or was not an after birth, depends her guilt or innocence of the crime with which she is charged. It is an ascertained fact in medical science, that different substances may be passed by women, in regard to which a great controversy exists in the profession, whether they are necessarily the result of sexual connection. In these circumstances, it was the duty of the public Prosecutor to have preserved and made a preparation of the substance which he founds on as an article of proof against the pannel. In analogous cases the Court has held that the Prosecutor must produce the coin, libelled as base, in order that the Jury may have an opportunity of examining it for themselves. (Case of M'Ginnes and Johnstone, July 16, 1839. Swinton, Vol. II. p. 435.)

The LORD ADVOCATE, for the prosecution, answered, —The objection now taken is one of a most serious kind, and if sustained, would introduce a complete revolution in criminal trials. In cases of murder it would, of course, be necessary to preserve and make a production of the dead body,—a step which has never yet been deemed necessary in this country, whatever may have been the case abroad. Moreover, the objection is premature, since the Jury alone are entitled to judge how far the evidence led by the prosecutor, is sufficient to support his case.

No. 111. Alison Punton, Nov. 5 1841.

Concealment of pregnancy.

LORD MONCREIFF—I have no doubt that the objection is bad. Suppose that the body of the child, which the pannel is charged with having borne, had been found dead, could it be maintained that the trial ought not to proceed unless that dead body was produced? It may be a good argument to the Jury that, from the state of the evidence, it does not clearly appear whether the pannel produced a birth or merely an abortion. The pannel may call as many medical witnesses as she pleases, to shew that the facts do not amount to evidence of a birth, and if that is not instructed by undoubted evidence, then she will be entitled to a verdict of acquittal. There is, in my opinion, therefore, no such prejudice sustained by the defence, owing to the non-production of the substance alluded to, as to warrant our refusal to receive the testimony of the medical witnesses regarding it.

LORD MEDWYN.—I concur. There is no authority as yet for requiring an anatomical preparation in criminal cases, and I would be loth to introduce any.

The LORD JUSTICE-CLERK.—I am of the same opinion. I see no point from which the prisoner will be foreclosed by the reception of the evidence which it is proposed to lead. The only question is as to the admissibility of evidence, regarding the nature of something which *might* have been, but is not, produced. It is impossible, however, for us to affirm the proposition which is evidently pointed at in this objection, that it is the duty of the prosecutor to produce a medical preparation of all animal substances which crown witnesses speak of as bearing against the prisoner.

The objection was accordingly repelled, and the examination of the medical witness resumed.

4. The proof having been concluded, and the Counsel on both sides having addressed the Jury, the Lord Justice-Clerk summed up the evidence. His Lordship observed, that the statute libelled on merely required that a child

should have been born. It is not, therefore, necessary for the Prosecutor to prove the birth of a *living* child; indeed such proof would, in most cases, be impossible. In the present case, however, the charge made against the pannel is, that she brought forth 'a *full grown* child.' Now this phrase imports a child which, at the period of its birth, had arrived at maturity in size, strength, and vitality. A child born in the seventh or eighth month cannot be considered a full grown child. Though it was quite unnecessary for the Prosecutor to aver that the child was full grown, yet, having averred it, he is bound to prove his case.

No. 111. Alison Punton, Nov. 5 1841.

Concealment of pregnancy.

The Jury unanimously found the libel not proven.

In respect of which verdict of Assize, the pannel was assoilzied *simpliciter*, and dismissed from the bar.

Present,

Nov. 13 1841.

THE LORD JUSTICE-GENERAL.*

THE LORD JUSTICE-CLERK.

LORDS MACKENZIE, MONCREIFF, MEDWYN, COCKBURN.

HER MAJESTY'S ADVOCATE—*Lord Advocate Rae,—Urquhart.*

AGAINST

ROBERT STEVENSON.—*Tennent.*

SHEEP STEALING—SENTENCE.—A pannel, who pleaded guilty to a charge of stealing two lambs, aggravated by having been previously convicted of theft, sentenced to twelve months imprisonment.

ROBERT STEVENSON, who, at a former diet of Court, had pleaded guilty as libelled, on an Indictment, which

No. 112. Robert Stevenson.

Sheep-stealing.

* The Right Honourable David Boyle of Shewalton, late Lord Justice-Clerk, took his seat on the bench this day as Lord Justice-General,

No. 112. Robert Stevenson, Nov. 13 1841.

charged him with the Theft of two Lambs, aggravated by a previous conviction of a petty theft, was brought up for sentence.

Sheep-stealing.

TENNENT, for the pannel, read a medical certificate, which bore that the pannel, who was far advanced in life, was in a very bad state of health.

THE LORD JUSTICE-CLERK.—When this case was formerly before the Court, we were anxious, considering the special circumstances of the prisoner at the bar, to inflict as lenient a punishment upon him as the nature of his crime, and the previous practice in such cases, might warrant. Several precedents of imprisonment having been awarded for petty cases of sheep-stealing, were brought under our notice.[1] But as none of these had occurred in

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to which office, together with that of Lord President of the Court of Session, he was appointed on the retirement of the Right Honourable Charles Hope.

[1] In addition to the cases of Norman M'Leod and William Nicholson, (Swinton, vol. I. pp. 261 and 262). in both of which the punishment for sheep-stealing was limited to imprisonment, similar instances of leniency have occurred at other Circuits, and before different judges. Thus at Glasgow, in January 1838, *Malcolm M'Fie*, who pleaded guilty of the theft of two sheep, was sentenced by Lord Medwyn to be imprisoned in Bridewell for eighteen months. A similar punishment was awarded by Lord Meadowbank at Ayr, in Spring 1838, against *Douglas Hanlon*, who pleaded guilty of the theft of two lambs, and *Joseph Cherry*, who was convicted of the theft of a lamb, At Inverness, in Spring 1838, *John Maclean* and *James Macdonald*, who pleaded guilty respectively of the theft of two lambs, and one sheep, were sentenced by Lord Cockburn to twelve months imprisonment. Nine months imprisonment, with hard labour, was the sentence passed by the Lord Justice-Clerk and Lord Mackenzie at Dumfries in Spring 1839, on *Samuel Thomson*, who pleaded guilty of a theft of a ewe. Two convictions of similar crimes before Lord Medwyn, at Glasgow, were followed by imprisonment in Bridewell for nine and twelve months respectively. (Cases of *David Black* and *John Johnstone*, Spring 1839.) The theft of two sheep was, on the same Circuit, punished by twelve months imprisonment in the Bridewell of Hamilton. (Case of *William Russell*.) And eighteen months imprisonment was the punishment awarded for the same crime by Lords Mackenzie and Medwyn, at Perth, in Autumn

No. 112. Robert Stevenson, Nov. 13 1841.

Sheep-stealing.

the High Court, it was thought advisable to take the opinion of the whole Court upon the matter.

THE LORD JUSTICE-GENERAL.—In applying my attention to this particular case, I feel the extreme importance of not letting it be understood that the Court of Justiciary can view the offence of sheep-stealing, in any but a very serious light. Considering the peculiarly exposed state of that species of property, the law has always regarded this offence as very heinous, deserving of most severe, indeed at one time, of capital punishment. Unquestionably there are different degrees of fault in this, as in other crimes. The theft of one sheep, or of two lambs, which is the charge here, is very different from the theft of several sheep, for it is not such a daring violation of the law. We must also remember the great relaxation which has of late years taken place in the severity of our penal code. In addition to the numerous Circuit cases in Scotland, I believe, that in England, similar leniency has been adopted, in the punishment of such offenders as the present. Upon the whole, therefore, though I am averse to laying down any general rule upon the subject, yet, looking to the particular state of this pannel, as proved by the medical certificate which has been read, and considering that the previous conviction which stands against him is for a petty theft, as well as the other special circumstances of the case, I am inclined to give the pannel the benefit of that milder system of punishment which the Circuit Courts have introduced.

THE LORD JUSTICE-CLERK.—I entirely concur, and am of opinion that a sentence of imprisonment for twelve months should be pronounced.

1840, (case of *David* and *James Mitchell.*) It appears that the practice in the High Court had been generally of a more severe nature. But a search of the records for the last four years has furnished only two cases of petty sheep-stealing, in which sentence of transportation was pronounced, namely *Donald Stewart*, 6th February 1837, and *John Yonson*, 17th July 1837.

No. 112. Robert Stevenson, Nov. 13 1841.

Sheep-stealing.

LORD MONCREIFF.—I by no means wish to mak[illegible] least encroachment upon the general rule, that a se[illegible] case of sheep-stealing must be visited with the pu[illegible] ment of transportation, but, taking all the circumstance[illegible] of this case into account, I am happy to concur in the lenient sentence which has been proposed.

The other Judges having expressed their concurrence, the pannel was, in respect of his judicial confession, and the special circumstances of the case, sentenced to be imprisoned in the prison of Edinburgh, for the period of twelve calendar months.

Nov. 29 1841.

Present,

THE LORD JUSTICE-CLERK.

LORDS MEADOWBANK, MACKENZIE.

HER MAJESTY'S ADVOCATE.—*Lord Advocate Rae—Urquhart—Milne.*

AGAINST

ROBERT CAMPBELL.—*Young.*

HOUSEBREAKING WITH INTENT TO STEAL.—A pannel charged with the above crime acquitted, in respect that the evidence negatived the entry of the premises

No. 113. Robert Campbell.

ROBERT CAMPBELL was charged with Housebreaking with intent to Steal,

Housebreaking with intent to steal.

IN SO FAR AS, on the night of the 12th, or early on the morning of the 13th day of October 1841, the said Robert Campbell did wickedly and feloniously break into and enter the shop in North Frederick Street, in or near Edinburgh, then and now or lately occupied by George Hill, then and now or lately residing in Saxe Cobourg Place, in or near Edinburgh, and carrying on business as grocer and wine merchant, under the firm of William and Robert Hill, in North Frederick Street aforesaid, by forcibly and violently making a hole in the roof and ceiling of

the said shop, from the floor of a house above it, which was at that time unoccupied, or in some other way to the Prosecutor unknown, having got admission into the said unoccupied house by means of a false key, or by forcing open the door thereof, or in some other way to the Prosecutor unknown; and this he did with intent to steal.

No. 113. Robert Campbell, Nov. 29 1841.

Housebreaking with intent to steal.

He pleaded not guilty, and a proof was led. It was proved that a hole had been made in the ceiling of the shop libelled, but that this hole was not sufficiently large to allow a man to enter. The pannel was apprehended in endeavouring to escape from the premises.

The Court held that the Prosecutor was bound to have proved *entry* of the shop libelled; and this having been negatived by the evidence, the Jury, under the direction of the Lord Justice-Clerk, found the pannel not guilty.

In respect of which verdict of Assize, he was assoilzied *simpliciter*, and dismissed from the bar.

HER MAJESTY'S ADVOCATE.—*Lord Advocate Rae—Urquhart—Milne.*

AGAINST

JAMES RITCHIE and ANDREW MORREN—*Young.*

UTTERING BASE COIN.—EVIDENCE.—It is competent, on a trial for uttering base coin, to lead evidence of previous unsuccessful attempts to utter, without any narrative of such attempts being set forth in the Indictment.

JAMES RITCHIE and ANDREW MORREN were charged with two acts of contravention of the statute, 2nd William IV. c. 34, §§ 7 and 8, (1.) by Uttering a Base Shilling, and, (2.) by having in their possession six Base Shillings, with intent to utter them.

No. 114. James Ritchie and Andrew Morren, Nov. 29 1841.

Uttering base coin.

They pleaded not guilty.

No. 114. James Ritchie and Andrew Morren, Nov. 29 1841.

Uttering base coin.

In the course of the proof,—URQUHART, for the prosecution, proposed to lead evidence in regard to various unsuccessful attempts made by the pannels to utter coin, which was refused as base.

YOUNG, for the pannels, objected to the competency of such proof, in respect that the Indictment contained no narrative of these attempts to utter, which is laid down by Mr. Alison (Vol. I. p. 417), to be indispensable.[1]

LORD MEADOWBANK.—I am of opinion that the evidence proposed is competent. It is not necessary to set forth in the Indictment circumstances of evidence; and we have, accordingly, been in the constant practice of allowing such proof as is here offered, without any such notice having been given to the pannel as Mr. Alison appears to consider requisite. When the present Lord Justice-General and I first went Circuits, it was the practice to embody in Indictments the whole contents of the precognition; but this has been long abandoned.

LORD MACKENZIE.—I concur in thinking that the circumstances proposed to be proved are competent as matter of evidence, and that it was unnecessary to set them forth in the Indictment. There are many cases in which it would be of much more importance to the pannel than it is here, to have notice in the Indictment of the evidence to be adduced against him. But it has not of

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[1] 'It is indispensable that the previous attempts to utter be set forth 'in the Indictment, and the time and place specified, with as much ac- 'curacy as the completed acts on which the Indictment is founded.' Reference is then made to Hume, Vol. I. p. 157. And in a subsequent passage of the same volume (p. 455), Mr. Alison observes, 'It is compe- 'tent to lead evidence of unsuccessful attempts to utter, not as substan- 'tive charges, but as articles of evidence, tending to fix the guilty 'knowledge in the completed charges libelled against the prisoner; but 'equally here as there, where this is intended, a fair and intelligible 'narrative should be given in the libel of those unsuccessful attempts, 'by time, place, and circumstances; and where this is not done, the 'proof of them should be stopped.'

late years been considered incumbent on the Prosecutor to give such notice.

No. 114. James Ritchie and Andrew Morren, Nov. 29 1841.

Uttering base coin.

The LORD JUSTICE-CLERK.—I concur. We must distinguish between what is matter of charge, and what is matter of evidence. The *onus* lies on the Prosecutor to prove guilty knowledge on the part of the pannel,—that is, his knowledge that the coin which the Indictment charges him with uttering was bad. For this purpose, it is quite competent to prove that the pannel was, on the same night, in possession of a quantity of other bad money, or at least of money which was rejected as bad, and received back by him as such. This has been allowed in several recent cases, and particularly in one from Ayr, in which proof was also brought, that the pannel had in his house instruments for coining. But it is not necessary to set forth in the Indictment these articles of mere evidence. The passage in Baron Hume, to which Mr. Alison refers, does not bear out the statement of the latter author.

The objection was accordingly repelled, and the proposed evidence led.

The proof having been concluded, the Jury unanimously found the pannels guilty.

In respect of which verdict of Assize, they were sentenced to be imprisoned in the prison of Haddington, for the period of eighteen calendar months.

Dec. 6
1841.

Present,

THE LORD JUSTICE-GENERAL.

THE LORD JUSTICE-CLERK.

LORDS MEADOWBANK, MACKENZIE, MONCREIFF, COCKBURN.

WILLIAM MORRISON, Suspender.—*Moncreiff.*

AGAINST

EDWARD KHULL, Respondent.—*Robertson.*

SUSPENSION AND LIBERATION—STATUTE 4TH GEO. IV. c. 34.—1. A bill of suspension of a judgment under the above statute, on the grounds, (1) that the complaint was not signed on every page, and (2), that the Justices are not authorised to proceed summarily, refused.

2. It is not necessary that a complaint or conviction under the above statute should bear, that the party complained against is an apprentice within the meaning of the acts therein recited.

No 115.
Morrison
v. Khull.

Susp. and
Lib.

On the 15th of May, the Respondent, a letter-press printer in Glasgow, presented to the Justices of the Peace for the county of Lanark a complaint, in the following terms :—

'15*th May* 1841.—Unto the Right Honourable her Majesty's Justices of the Peace for the County of Lanark: The complaint of Edward Khull, Letter-press printer, in Glasgow, humbly sheweth, that by an act passed in the fourth year of the reign of his Majesty George IV. caput 34, entitled, 'An act to enlarge the powers of Justices in determining complaints between masters and servants, and between masters, apprentices, artificers, and others;' by section first thereof it is enacted, 'that it shall and may be lawful not only for any master or mistress, but also for his or her steward, manager, or agent, to make complaint upon oath against any apprentice, within the meaning of the said before recited acts, to any Justice of the Peace of the county or place where such apprentice shall be employed, of or for any misdemeanour, misconduct, or ill-behaviour of any such apprentice, or if such apprentice shall have absconded, it shall be lawful for any Justice of the Peace of the county, or place where such apprentice shall be found, or where such apprentice shall have been employed,

No. 115. Morrison v. Khull, Dec. 6 1841.

Susp. and Lib.

"and any such Justice is hereby empowered upon complaint thereof "made upon oath by such master, mistress, steward, manager, or agent, "which oath the said Justice is hereby empowered to administer, to "issue his warrant for apprehending every such apprentice: and fur- "ther, that it shall be lawful for any Justice to hear and determine the "same complaint, and to punish the offender, by abating the whole, or "any part of his or her wages, or otherwise, by commitment to the "house of correction, there to remain, and to be held to hard labour for "a reasonable time, not exceeding three months.'"

'That where, by indenture entered into between William Morrison, 'residing in Glasgow, son of James Morrison, plasterer there, and the 'said James Morrison, as his cautioner, on the one part, and the com- 'plainer on the other part, in consideration of the weekly wages, and 'other prestations therein contained, he, the said William Morrison, 'bound and obliged himself, as an apprentice and servant, to the 'complainer, and his successors, in that branch of the complainer's 'trade, called a stereotype founder, and during the space of seven years 'complete, from and after the 8th day of July 1840 years, which, not- 'withstanding the date of the indenture, being 16th September 1840, is 'declared to have been the commencement thereof, and that he should, 'faithfully and diligently, without grumbling or complaint, but respect- 'fully and cheerfully, serve and obey his master, the complainer, or his 'successors, and his foreman and managers, in all things connected 'with the said trade, and without reference to set hours of working, 'and that he should not absent himself without his master's leave, as 'the said indenture herewith produced in itself more fully bears.

'That under this indenture the said William Morrison commenced, 'and continued to work with the complainer until Wednesday, the 17th 'day of March last, when, without the complainer's leave, he, the said 'William Morrison, absented himself from his said service, and has not 'since returned.

'That the complainer is informed that the said William Morrison, 'since his desertion, has obtained employment from, and is at present 'with W. and W. Miller, printers, in Bell Street of Glasgow.

'That the said William Morrison has thus been guilty of a misdemea- 'nour, misconduct, ill-behaviour, or has absconded, and therefore vio- 'lated the provisions and enactments of the before-recited section of 'the said statute, and has acted contrary to the obligations incumbent 'upon him under the said indenture, all which renders the present com- 'plaint to your honours necessary.

'May it therefore please your honours, or any one of your number, to 'take the complainer's oath to the verity of what is herein before 'set forth, and to grant warrant to constables of Court, and their 'assistants, to pass, search for, and apprehend the said William 'Morrison, and to bring him before you for examination, and to

No. 115. Morrison v. Khull, Dec. 6 1841.

Susp. and Lib.

'hear and determine this complaint, and on the complainer's proving, or the said William Morrison admitting the act of misconduct, misdemeanour, or ill behaviour, or of having absconded, as before set forth, to punish him, by abating the whole, or any part of his wages, if there shall be any due, or otherwise to commit him to the House of Correction there to remain, and to be held to hard labour for a reasonable time, not exceeding three months, or do otherwise, or farther in the premises as to your honours shall seem proper, and

'According to Justice,

(Signed) 'EDWARD KHULL,

'ALEX. STRATHERN, *Pror.*'

The Respondent having emitted an oath to the verity of the complaint, the Justices granted a warrant to search for and apprehend the Suspender, and to bring him to the Clerk's-office for examination. Thereafter, the following procedure took place.

'At Glasgow, the 17th day of May, 1841 years, In presence of 'Hugh Cogan, Esquire, one of Her Majesty's Justices of the Peace for 'Lanarkshire,

'In the petition of Edward Khull, against William Morrison, pre-'sent parties,

'Convened the said William Morrison, to whom the said petition 'was read over, and being examined thereon, declares, and admits, that 'he entered into the indenture founded on, that he deserted from the 'complainer's service, and has not since returned, and that he is in the 'employment of W. & W. Miller, all as stated in the said petition, which 'he admits in all respects; and his only reason for deserting the com-'plainer's service was, that he did not like the business: All which he 'declares to be truth.

(Signed,) 'WILLIAM MORRISON.

'HUGH COGAN, J.P.

'Glasgow, 17th June, 1841.—Having resumed consideration of this 'petition, at the instance of Edward Khull, against William Morrison, 'both therein designed, declaration of the said William Morrison, and 'whole process, finds the complaint sufficiently instructed, and that the 'said William Morrison has committed a breach of the section of the 'statute founded on: Therefore convicts the said William Morrison of 'the offence or misdemeanour charged against him, and grants warrant 'to Officers of Court to commit the said William Morrison to the 'House of Correction (now denominated the Prison) of Glasgow, there

'to remain, and be held to hard labour for sixty days from this date, 'and decerns.

(Signed,) 'HUGH COGAN, J. P.
'R. R. HOLMES, D. C.'

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Susp. and Lib.

Morrison having been incarcerated under this sentence, presented to the Court a Bill of Suspension and Liberation, on the following grounds:—

(1.) The complaint is irrelevant, so far as it does not set forth expressly, or by reference to the Acts 20th George II. chapter 19, 6th George III. chapter 25, 4th George IV. chapter 29, what description of apprentices come within the statute founded on. The statute does not apply to all apprentices, but only to apprentices within the meaning of the said prior Acts, and as these Acts are not stated in the complaint, nor the apprentices they apply to described, it does not appear on the face of the complaint that the Suspender is an apprentice within the meaning of the statute upon which the complaint is laid. (2.) The complaint is not authenticated by the incarcerator, or an agent, or the clerk of court. It is subscribed only on the seventh page. (2.) The Justices are authorised to '*hear* '*and determine the complaint.*' They are not authorised to do so summarily, nor to examine the party complained upon, nor to follow any specific procedure. They are simply directed to 'hear and determine' the complaint. Under these words the Justices must 'hear and determine' according to the known forms of law in criminal matters, or in a way consistent with the ends of justice. In the first place, therefore, they were not entitled to examine the suspender. Examination is competent by way of precognition, but it is not competent when the party is brought up to plead. In the second place, the Justices were bound either to give him notice of the complaint, or to allow him time to prepare himself for a defence. In the third place, they were bound to assign him an agent, at least to counsel him to employ one, and give him an op-

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portunity of doing so, the more especially as the incarcerator's case was conducted by an agent.

It was answered for the Respondent,

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(1.) It is not denied that the Suspender is an apprentice of the description to which the statute is applicable, and within the meaning of the recited acts set forth in the said statute. These acts except from the operation of the law Apprentices upon whose Indenture a higher premium than a certain specified sum had been paid. But the Suspender does not pretend to say that his case falls within any of the limitations. There was, therefore, not the least occasion for setting forth upon the record a contradiction of an exception inapplicable to the case. (2.) It is denied that the complaint is not properly authenticated. It is subscribed by the Respondent, and by his procurator, who sign the petition at the end of the prayer, in the usual way. No such instrument requires to be signed on each page. (3.) The proceedings under this statute are of a summary description. The Justice cannot grant a warrant to summon or cite the workmen, but at once must grant warrant to apprehend. (2 Alison, 122. Crawford, *v.* Wilson, 19th Nov. 1838. 2 Swinton, 201.) When, upon examination, the desertion is admitted, or when it is proved, the Justice must proceed without delay. This procedure, which commences by the oath of the applicant, is not of the description of an ordinary common law criminal procedure. It is, therefore, submitted that the conviction is regular, and unchallengeable.

The case came to be advised this day.

MONCREIFF, for the Suspender,—argued, that the omission to set forth in the complaint, that the party complained against, was an apprentice within the meaning of the statute founded on, must be fatal to the conviction. It has been expressly decided in England, that ' a conviction on

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'the 4th Geo. IV. c. 34, of an apprentice for a misbehaviour, 'must show on the face of it, that the defendant is an ap- 'prentice within the 4th Geo. IV. c. 29, which extends 'previous acts to apprentices, upon whose binding out no 'larger sum than L.25 has been paid' (Rex *v.* John Taylor and others, 1826. Dowling and Ryland's Reports, Vol. 7. p. 622.)

ROBERTSON, for the Respondent, answered,—The very point now raised, was decided in the case of Duthie *against* Birnie, May 20th 1839, (Swinton, Vol. 2. p. 385.) If the Suspender had stated that he fell within the exception in the statute, the case might have been different.

THE LORD JUSTICE-CLERK.—I do not see any distinction between this case and that of Duthie. Therefore, I do not enter on the merits of that decision. The complaint here is framed, just as any one, with the judgment of the Court in that case before him, would advise. I am therefore for holding the point closed.

THE LORD JUSTICE-GENERAL.—I am of the same opinion.

LORD MONCREIFF.—I cannot consider the point to be finally decided. One case ought not to bind us. The authority now quoted from the law of England does not seem to have been brought before the Court in Duthie's case. And this point, although it is contained in the reasons of supension, is not noticed by any of the Judges.

LORD MEADOWBANK.—Even if this point had not been already decided in the case of Duthie, I should hold the objection bad.

LORD COCKBURN.—I do not like the terms in which the conviction is expressed. The complaint bears that the party had 'been guilty of a misdemeanour, misconduct, 'ill-behaviour, *or* has absconded, and therefore violated' the provisions of the section of the statute; and the sentence convicts him generally of '*a breach* of the section of the statute founded on.'

The Court refused the bill, with expenses.

JOHN CULLEN, W.S.—BRINGLOE AND DOUIE, W.S. *Agents.*

HUGH M'INNERNEY, Advocator.—*Rutherfurd—Moncreiff.*

AGAINST

JAMES SIMPSON, Respondent.—*Sol.-Gen. M'Neill—Inglis.*

ADVOCATION AND SUSPENSION.—STATUTE 17 GEO. III. c. 56.—LOCUS DELICTI.—A judgment under the above statute suspended, in respect (1.) that the conviction contained no specification of any offence falling under the statute, and (2.) that the place of the alleged offence was not set forth in the conviction.

No. 116. M'Innerney v. Simpson, Dec. 6 1841.

Advocation and Susp.

On the 3d of August 1841, the Respondent, who was Procurator-fiscal and superintendent of Police for the burgh of Dunfermline, presented to the Justices of the Peace for the county of Fife, an information and complaint which, after quoting various clauses of the Act 17 Geo. III. c. 56,[1] proceeded as follows:—'That notwithstanding

[1] This act, entitled, 'An act for amending and rendering more effectual the several laws now in being for the more effectual preventing of frauds and abuses by persons employed in the manufacture of hats, and in the woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair, and silk manufactures, and also for making provisions to prevent frauds by journeymen dyers,' proceeds on a recital of the Act 22d Geo. II. c. 27, the provisions of which, relative to the purloining or embezzling of materials by workmen, or the possession by any person whatsoever, of such materials, without being able to give a satisfactory account of the way in which the possession of them was acquired, it re-enacts, making some alterations in the punishment of these offences, and also in the forms of proceeding. The 6th section proceeds on the preamble, that 'whereas such materials as aforesaid, which have been purloined or embezzled, are frequently received by persons knowing the same to have been so purloined or embezzled; and such materials being afterwards worked up or otherwise disposed of, renders it difficult to convict such offenders;' and enacts, that when any person shall be charged on oath, 'by virtue of this Act, with being suspected of, or with having purloined or embezzled, or with having received any such materials as aforesaid, whether the same be wrought or unwrought, mixed or unmixed, knowing the same to have been either purloined or embezzled, or received from some person or persons not entitled to dispose thereof; and it shall be made appear upon the oath, or (being of the people called Quakers) upon the affirmation of one

'the before-mentioned enactments, the complainer has 'good cause to suspect and believe, that purloined or em- 'bezzled materials of the woollen, linen, cotton, iron, 'leather, hemp, flax, or silk manufactures, or of these ma- 'terials, mixed or unmixed, wrought or unwrought, to- 'gether with tools and implements used in the manufac-

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'or more credible witness or witnesses, to the satisfaction of such 'Justices, that such person or persons hath or have purloined or em- 'bezzled, or hath or have received any such materials as aforesaid, 'knowing the same to have been purloined or embezzled, or received 'from some person or persons not entitled to dispose thereof, it shall 'and may be lawful for such Justices' to convict and punish the offen- der.

The 10th section is in the following terms:—'And whereas it fre- 'quently happens, that materials used in the manufactures before men- 'tioned, are found, or known to be concealed in the possession of per- 'sons who have received the same, knowing them to be purloined or 'embezzled, or of persons known not to be entitled to dispose of the 'same: and whereas the discovery and conviction of the purloiners 'and embezzlers, buyers and receivers of such materials, is full of dif- 'ficulty, from the close and clandestine manner in which the offence is 'committed, and there is still greater difficulty in proving whose pro- 'perty such materials are, and it would tend to the discouragement and 'suppression of such offences, if the discovery and conviction of such 'offenders were rendered more easy; and whereas, by the said recited 'Act of the twenty-second year of his late Majesty, King George the 'Second, Justices of the Peace, after conviction of any offender for 'purloining or embezzling the said materials, or for buying or receiving 'the same, are authorised to grant warrant for searching the houses and 'other places of the persons so convicted; but no such authority is 'given before conviction, nor in any other house or place except such 'as belongs to a person convicted; be it therefore enacted, that it shall 'and may be lawful for any two Justices of the Peace, of any county, 'riding, division, city, liberty, town or place, upon complaint made to 'them upon oath, by any one credible person, or (being of the people 'called Quakers,) upon solemn affirmation that there is cause to suspect 'that any such purloined or embezzled materials, whether mixed or un- 'mixed, wrought or unwrought, are concealed in any dwelling-house, 'outhouse, yard, garden, or other place or places, by virtue of a warrant 'under their hands and seals, to cause every such dwelling-house, out- 'house, yard garden, or place, to be searched in the day time; and if 'any such materials, suspected to be purloined or embezzled, shall be 'found therein, to cause the same, and the person or persons in whose

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'ture of said articles, or of drugs and ingredients used in 'dyeing the same, are concealed and to be found, in the 'shop, warehouse, dwelling-house, out-house, yard, gar-'den, or other place or places occupied by Hugh M'Inner-'ney, broker or merchant in Dunfermline, and situated 'in High Street, in the burgh of Dunfermline, and county 'of Fife. Moreover, your petitioner has good cause to 'suspect, and believes that the said Hugh M'Innerney 'has bought, received, accepted, or taken, by way of gift, 'pawn, pledge, sale, or exchange, purloined, or embezzled 'materials of the manufactures before specified, or one or 'other of them, wrought or unwrought, mixed or un-'mixed, knowing the same to have been either purloined 'or embezzled, or received from some person or persons 'not entitled to dispose thereof, in consequence of which 'the present application becomes necessary. May it there-'fore please your honours to take the petitioner's oath on 'the facts before stated, and to grant warrant to officers 'of court, to pass to the premises of the said Hugh 'M'Innerney, and to search the same for the said pur-'loined or embezzled materials and others, and to bring 'them before you, or any two of your number, and also 'to apprehend the said Hugh M'Innerney for examina-'tion, and upon his failing or refusing to account to your 'honours' satisfaction how he came by said materials, 'tools, implements, drugs, or ingredients; or upon its 'being made to appear to your satisfaction, that the said 'Hugh M'Innerney hath received materials of the manu-'factures before specified, knowing the same to have been

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'house, outhouse, yard, garden, or other place, the same shall be found, 'to be brought before any two Justices of the Peace for the same county, 'riding, division, city, liberty, town, or place; and if the said person 'or persons shall not give an account to the satisfaction of such Justices, 'how he, she, or they, came by the same, then the said person or per-'sons so offending shall be deemed and adjudged guilty of a misde-'meanour, and shall be punished in manner hereinafter-mentioned, al-'though no proof shall be given to whom such materials belong.'

'purloined or embezzled, or received by some person or 'persons not entitled to dispose thereof, to convict him 'accordingly in terms of the said act; and in respect that 'this is the first offence, to find that he has forfeited the 'penalty applicable thereto, to be levied and applied in 'terms of the said Act of Parliament; and in case of the 'said penalty not being paid or recovered by distress, then 'to grant warrant for committing the person of the said 'Hugh M'Innerney to the common gaol or house of cor-'rection of Dunfermline, for such space of time as is en-'joined by the statute before recited, or to do otherwise 'in the premises as to your honours shall seem meet, and 'to declare the materials seized to be forfeited in terms 'of the act.'

The Respondent having made oath to the verity of his complaint, the Justices granted warrant 'to constables of 'Court, to pass to the premises specified in the complaint 'occupied by the therein-designed Hugh M'Innerney, and 'there to search, in the day time, for the materials referred 'to in the said information and complaint, as craved; and 'if any such be found, to bring the same to the Town-'house of Dunfermline, and in that case also to appre-'hend the said Hugh M'Innerney, and to bring him be-'fore the Justices for examination.'

In consequence of this search-warrant, the premises of the Advocator were searched, and a variety of articles seized. He himself was apprehended and taken before the Justices, when he emitted a declaration, stating the names of various parties from whom he bought the goods in question.

Thereafter, the minutes of Court of 11th August bear—

'Whereupon the defender adopted and repeated the 'objections taken to the form of procedure in the case 'Simpson against Duff, which has now been disposed 'of;[1] and protesting against the procedure directed against

[1] The objections referred to resolved into a plea, (not ultimately insisted in), that the statutes in question are not applicable to Scotland.

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'him, he declined to examine any witnesses in proof of 'his innocence of an offence, as to which no proof has been 'led against him, but he respectfully refers the pursuer 'and the Justices of Peace to' (certain persons named.) 'And farther, he produces' (various documents specified.) 'And he intimated that the above-named witnesses have 'been in attendance all day; but he protests that any in- 'vestigation, with reference to his conduct or possession 'of property, shall be conducted in a legal manner.

'Whereupon it was moved by the complainer, that the 'Court do now pass judgment.

'The Court thereupon intimated to the defender, that 'that adjourned diet was held for the purpose of allowing 'him to bring evidence, and examine witnesses in support 'of his declaration, and they now call on him to proceed 'with his proof in terms of the Act; or they are ready 'to hear the evidence of such witnesses as he may choose 'to adduce: And the defender having respectfully re- 'peated his declaration, the pursuer again repeated his 'motion for judgment.

'The Court thereafter pronounced judgment, as con- 'tained on a sheet of parchment, issued under their hands 'and seals of this date, in terms of the statute.'

A judgment was accordingly pronounced, and a distress warrant issued in the following terms:—

'Dunfermline in the County of Fife, to wit.—Be it re- 'membered, that on the eleventh day of August, in the 'year of our Lord one thousand eight hundred and forty- 'one, Hugh M'Innerney, broker or merchant in Dunferm- 'line, and residing in High Street in the town of Dun- 'fermline and county of Fife, was, upon a complaint made 'upon oath against him, by James Simpson, residing in 'Dunfermline, convicted before us, James Morris, George 'Birrel, and Alexander Colville, Esqs., three of Her Ma- 'jesty's Justices of the Peace for the county of Fife, of a 'misdemeanour, in so far as he had in his possession, upon 'the third day of August and year foresaid, a quantity 'of cloths of the linen, cotton, and worsted manufac-

'tures, and he did not produce the parties duly entitled to dispose of the same, of whom he bought or received the same, nor give a satisfactory account of how he came by the same, contrary to the provisions of an Act of Parliament, passed in the seventeenth year of his late Majesty George the Third, chapter fifty-six. Therefore, it is considered and adjudged by us, the said Justices, that the said Hugh M'Innerney hath, for the said offence, forfeited (it being a first offence) the sum of twenty pounds sterling, and we declare the said cloths to be forfeited, and authorize them to be disposed of in terms of the statute. And we do hereby authorize and empower you , and each of you, our constables in that behalf, to levy the said sum of twenty pounds sterling, by distress and sale of the goods and chattels of the said Hugh M'Innerney, rendering to him the overplus, after deducting the expenses of the said distress and sale, the sale to take place not less than four, nor more than eight days after the date of the distress, of which forfeiture one half shall be paid to the said James Simpson, the informer, and the other half to the treasurer, to and for behoof of the Ladies' Charity School, Dunfermline. And if no sufficient distress can be found whereon to levy the said forfeiture of twenty pounds sterling, then you are to report the same to us, in order that our warrant may issue forth for committing said offender to jail, in terms of said Act. Given under our hands and seals the day and year first above-mentioned.'

M'Innerney presented to the Court a Bill of Advocation, Suspension, and Interdict, maintaining that the proceedings against him were not only most iniquitous and oppressive, but in all respects incompetent and irregular, and at variance with the intentions of the Legislature in the statute founded on, as well as with the ordinary principles of law.

The Act of the 17th Geo. III. was a repetition and al-

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teration of various former statutes embodied in the 22d Geo. II., the object of which was, to prevent the theft and embezzlement, by workmen, of materials used in manufactories. The whole of the provisions of the statute, as well as of those which had previously subsisted, were applicable to the forms and the law of England, and are only extended to Scotland by an incidental clause introduced into the Act 22 Geo. II. It is an Act altogether inconsistent with the genius of our criminal law, and has hitherto been very little observed.

The Respondent founds his charge on the sixth and tenth clauses of the Act. The terms of these clauses are considerably different. The first relates to the case of a party accused upon oath of receiving purloined materials; and he is to be convicted on proof *undertaken and led by the informer*, that the materials have been purloined, and that the party receiving them was in the knowledge of the dishonest nature of their acquisition. No burden of proof is laid upon the accused, and his conviction is to proceed on his guilty knowledge being demonstrated. The presumption of innocence is left to him under this section.

The distinction between this section and the tenth, consists in the fact, that the conviction under the former is to proceed in the absence of the stolen or embezzled materials, while in the latter the procedure depends upon their production. That section, to a certain extent, does shift the *onus* of proof from the informer to the accused, but by no means to the extent which seems to be assumed in this case. By the former section, when the embezzled materials were not produced, the presumption of innocence still remained to the suspected party. The tenth clause provides for the case of embezzled materials being *known* to be in the possession of a party, when it may be doubtful to whom these materials belong. This its preamble distinctly sets forth. It implies that, when an oath has been made that certain specific materials are to be found in the possession of a party, and on a search being granted, these very materials are found, a presumption is thereby raised,

by these two coinciding facts, against the innocence of the party suspected, which he must rebut by giving a reasonable account of the manner in which the materials were acquired. The provisions of this section, therefore, require two things,—First, that the nature of the information given shall be such, that the fact of the materials being found shall raise this presumption of guilt; and secondly, that the party is only to be convicted if he shall not be able to give a satisfactory account of the manner in which he acquired them.

None of these requisites have been fulfilled by the procedure in the present case.

(1.) The information presented to the Justices, and on which the Advocator was to be tried and convicted, if it did not accuse him of every crime under the sun, only fell short of this extravagance, because it was necessarily confined within the limits of the statute. It accuses him, however, of committing every conceivable crime under these sections of the statute, in every conceivable way, and the informer, moreover, declares upon oath that he believes this to be true. This sweeping declaration of belief was only one of five or six similar documents issued at the same time. There had not been, as far as the Advocator is aware, any allegation of materials having been lost by, or stolen from, the manufacturers. The proceeding was in fact a mere cast of the informer's net, for the purpose of trying what penalties he could catch.

Now it is submitted, with great confidence, that this was not an application which the Justices were entitled to entertain. In the first place, the idea of sending a man to trial on an accusation charging him with all manner of offences, is so utterly at variance with every principle of justice, that it would be difficult to admit of such a proceeding, even under very imperative expressions in an Act of Parliament. If a man were charged with having committed one or other of the various crimes which head the chapters in Hume's Commentaries, he could not be more at a loss to know whether murder, or fire-raising, or trea-

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son was to be the subject of his trial, than the Advocator was when apprehended on this charge, to discover whether wool, or iron, or tools, or drugs, were the articles said to be embezzled by him.

But, in the second place, although the statute in question is severe, these proceedings have the effect of entirely destroying the principles on which it proceeds. The 10th section of the statute, as has been already seen, puts the accused in certain circumstances in some degree on the proof of his innocence;—but that only where the oath of a credible person to his belief that the goods are concealed, coupled with the actual discovery of these goods, has raised a certain presumption of his guilt. Manifestly, however, under such a proceeding as the present, the very elements of suspicion on which the statute founded this harsh and anomalous subversion of ordinary rules, cannot possibly emerge. Neither of the two concurring circumstances can exist in such a case. When an informer is found making oath to that which is palpably a plain impossibility, and which he swears to, evidently not from conviction or belief, but at mere random, no presumption can thereby be raised in the mind of any rational man, except one very unfavourable to the strength of the informer's scruples. It can raise no conceivable supposition of guilt. And then again, when a party deliberately swears that he believes that the shop of a general merchant contains all manner of materials such as those described in the information, the fact of goods manufactured from such materials being found there, would be only what was notorious, and what every passer-by might have observed. It needs no conjuror to tell that silk may be found in the warehouse of a haberdasher, or that iron may lurk concealed in a foundry, or that coals may be discovered at Newcastle. And, in the same way, it might safely be affirmed of any broker in the kingdom, that he had in his possession some such goods as those referred to. But, so far from their possession creating a suspicion of disho-

nesty, it would be much more wonderful if none of them should be found.

It is absolutely necessary for the protection of honest tradesmen that a stop should be put to proceedings like the present. Whatever may be the advantages of the statute in detecting and punishing secret embezzlement, they can never counterbalance the injustice consequent on such a palpable abuse of it as that now before the Court. It is perhaps a question of circumstances in each case, whether the informer has specified the nature of the suspected goods as far as his knowledge permitted him. But the substance of the present objection is, that the informer has made no specification at all, and that he has thereby reduced the oath which the statute intended to form an element of evidence, into a mere matter of form, raising no presumption whatever.

(2.) No better illustration of the practical result of this proceeding could be desired, than is afforded by the sequel of the present case. Out of the Advocator's stock the informer selected twenty-five articles. He does not, however, make any new condescendence of what these articles are, nor is there any thing in the proceedings by which their nature or their number could be regularly discovered. They were, however, taken to the Justice of Peace Court; and, according to the interpretation there given to the provisions of the act, it became the duty of the Advocator to account for the way in which these came into his possession. He is accordingly examined in relation to them. It appears from his declaration, that the articles consist, for the most part, of various small pieces of manufactured cotton goods. It may fairly be doubted how far these goods are *materials* in the sense of the 10th section of the statute. The words of that section expressly specify materials *used* in manufactories. It is difficult to see how that term can be correctly applied to an article already manufactured. (See the opinion of Lord Cockburn in the case of Gillies *v.* Jeffrey, Dec. 4, 1839. Swinton, Vol. II. p. 464.) On being required, however, to account for his

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possession of the goods, although they appear to have been selected at random from his general stock, the Advocator yet, almost in every instance, specified the precise individual from whom he purchased those goods, and in many of them the precise sum he paid for them. In two instances only he cannot at the time recollect from whom he purchased the articles in question; but, in one of these instances, he distinctly declares that he had the goods in his possession for more than a twelvemonth. He submits that this statement was a satisfactory explanation of the way in which those goods were acquired, such as was contemplated by the statute. The case contemplated by the statute, plainly was that of a party either refusing, or not being able, to give any account of the manner in which the suspected materials had come into his possession. This was perhaps a fair element enough on which, taken in conjunction with the discovery of the goods and the oath of the informer, to assume the party's guilt. But when a party is asked to give an account of the way in which he acquired an article, what account can be more satisfactory than the name, designation, and residence of the person who sold it to him, and the price paid for it? And yet a satisfactory account is all that the statute requires, and indeed all that the informer in his information or libel demanded. He only required the punishment of the complainer, in the event of his *refusing or failing to account*, to their honours' satisfaction, how he came by the said materials. The Advocator neither refused nor failed to account for how he came by them. He gave a clear and distinct account of the manner of their acquisition; and therefore, unless the informer could have proved, under the other section of the act, that he had received them, knowing them to be purloined, the prosecution was at an end. The Respondent may perhaps say, that a satisfactory account is not sufficient, but that he was entitled to a satisfactory proof. The reply to this is, that the act does not require a proof from the accused, but only a satisfactory account; and for this plain reason, that if the accu-

sed can give a satisfactory account of his possession of the materials, there remains no presumption of guilt against him. The act, stringent as it is, never intended to put a party on a proof of his innocence under a mere random accusation, which would be a stretch of injustice, of which it may safely be affirmed, that no consideration of public policy would justify it. It holds the inability to account to be conclusive against the accused, unless he can demonstrate his innocence: but it does not say, and does not intend, that if he does account satisfactorily, he shall be bound also to prove it. On the contrary, if a presumption of guilt arises under it, from the failure to account, the presumption of innocence returns whenever the satisfactory account is given.

(3.) The Advocator is not aware by what authority the Justices declared the goods in question forfeited. There is no provision in the act authorising them to do so.

The Respondent answered,—

(1.) The Advocator's first objection relates to the form and terms of the Respondent's original application or complaint to the Justices. The statute (§ 10) provides, that if a credible person make a complaint upon oath, that there is cause to suspect that purloined or embezzled materials are to be found in the possession, or within the premises of any person, the Justices shall grant a search-warrant. The first condition, then, upon which the Justices are entitled to proceed under this clause is, that some credible person shall make oath that he has grounds of suspicion. But it is not an oath of verity. This person does not swear that embezzled materials *are* in the possession of the accused party, and therefore it is a complete mistake to say, as the Advocator does, that 'the present clause provides for the case 'of embezzled materials being *known* to be in the possession of a party,' or that it is necessary that 'an oath has 'been made, that certain specific materials *are to be found* 'in the possession of a party.' The complaint then, entirely fulfils the requisites of the 10th clause of the statute.

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The substance of the accusation is, present possession of embezzled materials; and the statement of this accusation, and of the prosecutor's suspicion and belief of its truth is abundantly distinct.

The Advocator is very indignant at the comprehensive character of the accusation, which he says imputes to him the harbouring of 'embezzled goods of every description 'mentioned in the statute.' This, however, is not precisely the fact. The complaint includes only the materials employed in the common manufactures of Dunfermline, being woollen, linen, cotton, iron, leather, hemp, flax and silk, whereas the statute includes also fur, mohair, and fustian manufactures, none of which are carried on in Dunfermline. But even supposing that the complaint had been made much more at random than it actually was, is there any thing in this inconsistent with the statute? An oath, that there is cause to suspect that '*any such*' purloined or embezzled materials are to be found, is sufficient to entitle the Justices to grant a search-warrant. But is it to be maintained, that the oath or complaint must set forth the nature of the materials which are to be found in the suspected premises, with the same precision as an ordinary indictment? Such a course is obviously altogether incompatible with the nature and use of an oath of credulity or suspicion. In that case, no complaint could be made except upon the ground of absolute and certain *knowledge*, and for the prosecution or detection of theft in such circumstances no statute was required, the common law being sufficiently powerful and effectual. But the statute was passed with a special view to those cases where certain knowledge of the fraud or embezzlement, or reset, was impossible, and for the purpose of removing the difficulty experienced in discovering and convicting offenders, 'from the close and clandestine manner in which the 'offence is committed.'

Nor is the course adopted by the Respondent, and sanctioned by the Justices, productive of any of the hardship or inconvenience alleged by the Advocator. The posses-

sion of embezzled materials used in certain specified trades, is the charge upon which the statute not only empowers, but binds the Justices to proceed. The honest trader is put to no disadvantage by the general terms of such a charge; for every facility, and all reasonable time are afforded him, to explain how he came by such materials as may be found in his premises. But it is not surprising that to the resetter, and to the dealer in embezzled materials, the statute should appear very formidable, and even unjust; for it gives, and was intended to give, the prosecutor the advantage of coming upon the accused unawares, without allowing him time to fabricate a plausible story, or opportunity to remove or dispose of the embezzled materials.

The Advocator seems to have misapprehended altogether the nature and object of the complaint which he has thus been criticising, as if it had been a regular indictment. It is, after all, *merely preliminary to the search-warrant*, and when the search-warrant has been obtained and executed, the complaint has served its turn, and is of no farther use. Such was the opinion of the Court in the case of M'Kenzie *v.* Jeffrey, 11th June 1838, (2 Swinton, p. 152.)

But under the first branch of the Advocator's case, there seems to be a second objection involved, although not fairly or distinctly stated, which may be allowed to pass with a single observation. It is said that the presumption of innocence is removed, and the *onus* of proof laid on the accused by the statute, only on condition that the information given in the complaint, and the result of the search, shall precisely correspond. To what does this plea necessarily amount? In order to justify a conviction under the statute (according to the Advocator) the prosecutor, who (the statute assumes) has no *knowledge* but only *suspicion*, must give a precise and specific description of the goods alleged to be in the possession of the accused, and the goods found under the search-warrant must exactly correspond with the description of the prosecutor. But it is

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needless to say that such a combination of circumstances is absolutely impossible in any case properly falling under the statute, and is not very likely to be realised in the case of any offence or accusation whatever. To require a precise description from the prosecutor, is totally inconsistent with the nature of an oath of credulity or suspicion, and it is equally absurd to maintain, that although the result of the search be to justify part of the oath, no conviction can follow, unless every suspicion of the prosecutor be fully realised. Such an argument assumes not only that the prosecutor must have *certain knowledge*, but also that the state of the accused's premises, and of his possession of the embezzled goods, must be precisely the same at the time of the search, as it was at the time the prosecutor acquired his knowledge. These, however, are not the requisites of the statute. For the 10th section provides, that 'if *any* such materials suspected to be pur-'loined,' are found, and not satisfactorily accounted for, the possessor of them shall be deemed guilty of a misdemeanour.

(2.) The Advocator's *second* ground of advocation resolves into this, that the Justices ought to have been satisfied with his declaration, and thereupon to have acquitted him. Now this is plainly a plea upon the merits; for to the Justices is committed the power of judging whether the declaration of the accused is satisfactory or not, and according to the opinion which they form, they are directed either to acquit the accused, or to allow him a proof, or with or without a proof to convict him.

The Respondent maintains that an advocation or suspension of a conviction before the Justices under this statute, is incompetent on any ground directly involving the merits of the complaint. He does not dispute that if the Justices disregard the provisions of the statute, the Supreme Court has power to set them right; but review of such proceedings upon the merits is by statute appropriated to another Court.

The same statute (13th Geo. II. cap. 8, §§ 9 & 11,

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which extended this law to Scotland, directed that an appeal should be taken from the Justices in Petty Sessions to the General Quarter Sessions of the Peace; but that no warrant granted by Justices in Scotland for poinding or distraining, 'shall be stopped or sisted by any suspension, 'sist, or other process whatever, except an appeal entered 'to the Quarter Sessions of the Peace as hereinbefore di-'rected.' Some portions of this statute were afterwards repealed or altered, but the clauses now referred to remain unrepealed to the present day, and the last statute on the subject, 17th Geo. III. cap. 56, sec. 23, provides, 'that 'nothing herein contained shall extend, or be construed to 'extend to repeal any former law or laws now in being 'for the punishment of any of the offences herein above 'specified, except so far as is particularly expressed by 'this Act.' Upon this point, too, it must be observed that the later statutes expressly *refer* to the former, and where they give to the Justices a power of convicting in an altered form, or upon new grounds, they must be held to refer to, and incorporate all the provisions of the former statutes applicable to convictions, in so far as they are not repealed. Thus the convictions for embezzlement and reset of embezzled materials under the 13th Geo. II. were not reviewable by the Court of Justiciary, but only by the Quarter Sessions. The convictions authorised by the 10th section of 17th Geo. III. proceed upon somewhat different grounds from the convictions under the old statutes, but are subject to the same qualities and conditions in other respects, and must therefore be held by virtue of the old statute to be reviewable by the Quarter Sessions only, and not by the Court of Justiciary. This rule of construction has been fully recognised in England. In one case, which seems to afford an exact parallel to the present, it was decided, that if a statute prohibit contraband goods under a penalty, a subsequent statute declaring goods contraband, will draw the penalty after it, although no penalty be imposed in the later statute. (Dwarris on Statutes, p. 706, and 1 Price, p. 182.) In this view of the case, then, the

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attempt to suspend the conviction and warrant of distress, and to interdict the Respondent from executing them or following them out, is in express terms prohibited by the 13th Geo. II.

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But it is by no means necessary to the objection of incompetency which the Respondent is now maintaining, that he should press his argument upon the construction of the statutes to this extent. For there is within the latest statute itself, without reference to any of the earlier, a provision which necessarily excludes the review of this Court upon the merits of a case like the present. By the 20th section of 17th Geo. III. cap. 56, any person thinking himself aggrieved by an order or judgment of the Justices, before whom he is convicted of any offence under these statutes, 'may appeal, and the said Justices are hereby 'required to make known to such person at the time of 'such conviction, his or her right to appeal to the next 'General or General Quarter Sessions of the Peace.' The complainer, therefore, had a remedy and a right of appeal under the statute, and it is not pretended that the Justices failed to make this known to him in terms of the statute. He did not, however, choose to avail himself of this right, but selected for himself a different Court of review, to which the statute gave him no right to appeal. The Respondent has no occasion to enquire whether a judgment of the Quarter Sessions reviewing a judgment of the Justices under these statutes, may or may not be brought up to the High Court of Justiciary by suspension or advocation. All that he pleads is, that a conviction by the Justices in Petty Sessions under these statutes, is not directly reviewable by this Court; that a party in the situation of the Advocator is not entitled to disregard the mode of review pointed out in the statute, and to invent or adopt a new remedy of his own. (Mair *v.* Milne, June 17, 1822, 1. Shaw last edition, 440. Cook *v.* Milne, May 17, 1823, 2. Shaw, 280. Campbell *v.* Milne, June 28, 1823, 2. Shaw, 292. Alexander *v.* Seymour, Dec. 2, 1828, Fac. Coll.)

It has been said, (Swinton's Reports, Vol. I. p. 250,

Note,) that there is a difference between the language of the statutes under consideration here, and of those which the Court of Session have construed in the manner above explained. In the latter it is provided, that the party aggrieved 'shall and may' appeal to the Quarter Sessions, and in one of them (10th Geo. II.) that 'it shall and may be lawful' for a party so to appeal,—while in the 17th Geo. III. it is only provided that a party 'may appeal.' This distinction, however, with all deference, appears exceedingly shadowy; for it is well known that the word 'may' has frequently the same imperative force as the word 'shall;' and the intention of the Legislature is to be gathered rather from the subject and purpose of the enactment than from the use of the one word or the other. When a right of appeal is given, it is conferred as a privilege, and the use of the word 'may' is perfectly appropriate. But the foundation of the rule of law contended for by the Respondent lies deeper than the mere meaning of statutory terms; for where the Legislature prescribes a certain remedy, or a certain form of action, or a certain mode of review, it is reasonable to conclude that they intended that to be followed to the exclusion of every other, or at least to be followed in the first instance. In this view, then, it matters very little in what words the Legislature confers the right or privilege. Though the terms be such as in other cases might be construed to be permissive merely, the substance and the nature of the enactment bind the lieges to follow the course pointed out by the statute.

On the merits—the circumstances of the present case, are totally different from those on which judgment proceeded in the case of Gillies *v.* Jeffrey, (4th December 1839, 2. Swinton, 454.) It is not pretended that the wrought materials which were seized, were wrought up by the accused himself, who is a broker and not a manufacturer. On the contrary, they are precisely that species of wrought materials which form the subject of embezzlement most frequently among working weavers, and they must have come into the possession of the accused, just in

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the same condition in which they were found at the time of the seizure.

But passing this plea, the Respondent has been not a little surprised to find the Advocator maintaining that his declaration contains 'a *satisfactory explanation* of the 'way in which those goods were acquired, such as was 'contemplated by the statute.' This certainly proceeds upon a total forgetfulness of the nature of the offence with which he was charged. According to the statutes, no man is entitled to receive any of the specified materials from any person employed in the manufactures in question, '*knowing the person or persons of whom he, she, or they* '*so buy, receive, accept, or take the said materials, to be* '*so hired or employed as aforesaid, and not having first* '*obtained the consent of the person or persons so hir-*'*ing or employing him, her, or them,*' [22d Geo. II., as amended by 17 Geo. III. cap. 56, sec. 3.]—and the possession of materials, under such circumstances, is an offence under the statute, and the very offence of which the Advocator was convicted before the Justices.

What, then, are the facts of the case, as established by the Advocator's declaration, which he has the modest assurance to represent as 'satisfactory?' He admits his possession of various articles unquestionably falling under the description of the statute, and of course it might be expected, from the ground now occupied by the Advocator, either that he had received these articles from parties unconnected with manufactures, and entitled to dispose of the same without question, because not placed in a situation of suspicion; or at least, if he received them from working manufacturers, that he should be able to shew that he acquired them with the consent and approbation of their employers, in terms of the statute. But so far is this from being the case, that, according to his own statement, in every case where he chooses to give an account at all, he received the articles from working weavers, or from the wives or daughters of working weavers.

(3.) The Advocator questions the legality of that part of

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the conviction, by which the Justices declare the subjects of seizure to be forfeited, and authorise them to be disposed of in terms of the statute. This is an objection which, even supposing it to be well founded, does not lie in the mouth of the Advocator. In disposing of it, it must of course be assumed that the conviction is good otherwise; and that the Advocator is guilty of the offence with which he is charged. Whatever, then, be the legitimate destination of the materials seized in his premises, it is at least clear that they can never be restored to him. Indeed, the statute expressly provides for them a different destination. But no statute could be required to instruct the Justices that they could not with propriety restore to the resetter the embezzled goods found in his possession. The Advocator therefore has no interest, and consequently no title, to insist in this objection. But farther, the objection is groundless in itself. The Justices, it will be observed, declare the materials to be forfeited, only as preliminary to their authorising them to be disposed of in terms of the statute, 17th Geo. III. c. 56, § 13. In order to entitle the Justices to grant warrant for disposing of the articles, they must in effect be forfeited, whether they be declared to be so or not. It is the forfeiture consequent upon the conviction of their recent possessor,—the legal annihilation of his title of possession,—that can alone be the ground for authorising the articles to be disposed of in terms of the statute.

The case came to be advised this day.

MONCREIFF, for the Advocator, argued—(1.) The original complaint is a document which does not warrant any procedure. The informer was bound to have stated what the particular materials were, which he suspected to be in the Advocator's possession. Without some such specification there was no sufficient oath as a foundation for a search warrant. The complaint, as worded, might be made against every honest trader. (2.) The goods seized

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being table-cloths, and other finished articles of manufacture, do not come within the meaning of the statute, which relates only to 'purloined or embezzled *materials*.' (3.) The conviction is altogether irregular. It contains no specification of the place where the alleged offence was committed—and that although the form prescribed by the statute contains a blank for that purpose.[1] (Case of Yeaman *v.*

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[1] Section 21 provides that 'The Justices before whom any offender 'shall be convicted of any offence either against the said act of the 'twenty-second of George the Second, as varied by this act, or against 'this act, shall cause the conviction to be certified to the next General, 'or General Quarter Session of the Peace to be held in, and for the 'county, riding, division, city, liberty, town, or place where such 'conviction was made, to be filed with the records of such Sessions; and 'such conviction shall and may be drawn up and written on parchment, and certified in the following form of words, as far as the name 'of the person and the nature of the case will admit of; (that is to 'say,)

'*Middlesex*, (or any other place, as the case shall be,) *to wit*, } 'Be it remembered, that on the day of , in the year of our Lord A. B. was convicted before us of his Majesty's Justices of the

'Peace in and for the said county of , *or* for the riding of 'the said county of , *or* for the city, liberty, town, 'or place, aforesaid in the said county (*as the case shall be*) 'of . [*Here specify the offence, and when and 'where the same was committed.*]

'Given under our hands and seals the day and year 'first above written.'

By section 22, 'No order made touching or concerning any of the 'matters in this act contained, or any proceedings to be had touching 'the conviction of any offender or offenders against the said act of the 'twenty-second of George the Second, or this act, shall be quashed for 'want of form, or be removed or removeable by *certiorari* into his 'Majesty's Court of King's Bench; and the Justices before whom such 'convictions shall be had, shall cause the same, *drawn up in the form 'aforesaid*, to be fairly written upon parchment, and transmitted to the 'next General, or General Quarter-Sessions of the Peace, to be held for 'the county, riding, division, city, liberty, town, or place wherein such 'conviction was had, to be filed and kept amongst the records of the 'said General, or General Quarter-Sessions; and in case the person or 'persons so convicted shall appeal from the judgment of the said Justices to the said General, or General Quarter-Sessions, the Justices, on

Tod, July 11, 1836. 1 Swinton, p. 247.) Moreover, it does not convict of any offence, but merely says that the Advocator was guilty ' of a misdemeanour, in so far as he ' had in his possession a quantity of cloths, &c.,' without alleging that they had been, or were suspected to be, purloined or embezzled.

INGLIS, for the Respondent, answered,—If effect is to be given to the objections stated, the statute will become wholly useless. (1.) In regard to the complaint, all that is required is, that it should proceed at the instance of a credible person, and should set forth that he has good cause to suspect that articles of the nature referred to in the statute are to be found in the possession of the party complained against. The extent of his suspicion does not affect the validity of the complaint. (2.) The provisions of the statute relate to materials, ' wrought or unwrought, ' mixed or unmixed;' and the preamble of the sixth section speaks of ' such materials being afterwards *worked* ' *up*,' which must mean *manufactured*. (3.) As to the conviction,—in the case of Yeaman against Tod, the original complaint contained no specification of the *locus*. The judgment of the Court proceeds specially on this omission, although a similar want in the sentence is also founded on in the pleadings. Here, however, the complaint sets forth, that the articles in question ' are con- ' cealed, and to be found in the shop, warehouse, dwell- ' ing-house, out-house, yard, garden, or other place or ' places occupied by Hugh M'Innerney, broker or mer- ' chant in Dunfermline, and situated in High Street, in ' the burgh of Dunfermline and county of Fife.' And even the conviction bears, that ' Hugh M'Innerney, broker

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' such General, or General Quarter-Sessions, are hereby required, *upon* ' *receiving the said conviction, drawn up in the form aforesaid*, to pro- ' ceed to the hearing and determination of the matter of the said appeal, ' according to the directions of the said act, any law or usage to the ' contrary nothwithstanding.'

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'or merchant in Dunfermline, and *residing in High Street, in the town of Dunfermline and county of Fife,*' was convicted 'of a misdemeanour, in so far as he had *in his possession*' the articles in question,—which is quite equivalent to a direct statement of the *locus*. The words of the statute (§ 21), are directory only; and the conviction and complaint must be read together. Then, as to a specification of the offence: the judgment convicts the party, in the express terms of the statute, '*of a misdemeanour*;' and what this is, is defined by the tenth section. It was not necessary that the suspicion of the goods being purloined or embezzled should be set forth in the conviction. That suspicion is merely the foundation of the charge. It does not give either a character to the goods, or a character to the party's possession of them.

THE LORD JUSTICE-CLERK.—If the conviction cannot be sustained, it is not necessary that we should enter on the other questions, which are of wide application. Four distinct objections arise on the face of the conviction. (1.) There is no specification of any offence under the statute founded on. (2.) The place where the crime was committed is not set forth. (3.) The substances referred to are maintained not to be articles of the particular description to which alone the statute refers; and, (4.) reference is made to a clause of the statute, as to the appropriation of the articles, which is said not to apply. It is not necessary to give any opinion as to these two last points; for the other two appear to me sufficient to set aside the conviction. The twenty-first and twenty-second sections of the statute are very specific. The former contains an express form for all convictions, which is to be observed, 'as far as the name of the person, and the nature of the case will admit of.' And the latter points out why a particular form is required,—namely, for the sake of the appeal to the Quarter Sessions. I admit that if there was no prescribed statutory form, you might, by a reference to the complaint, arrive at a know-

ledge of what the offence was. But the conviction here is the record to be returned to the Quarter Sessions; and it ought to contain all that is necessary to enable the appeal Court to judge whether the decision should stand. That is not the case here. The party is convicted of a misdemeanour 'in so far as he had in his possession'—'a quantity of cloths of the linen, cotton, and worsted manufactures, and did not produce the parties duly entitled to dispose of the same, of whom he bought or received the same, nor give a satisfactory account of how he came by the same.' Looking at the tenth section of the statute, this is not a specification of the statutory offence. In the first place, the conviction ought to have stated what the particular articles were,—as to which there could be no doubt after they were found. Then it should have been set forth, that they were materials 'suspected to be purloined or embezzled.' Up to the date of the trial, there is nothing beyond the suspicion of the party lodging the complaint. But after the articles are brought before the Justices, it is no longer sufficient that they shall be suspected *by the complainer* to be purloined or embezzled, unless the same suspicion exists in the minds of the Justices. Then, as to the place where the offence was committed—there is no room for construction, but a distinct statutory form which ought to have been observed.

LORD MEADOWBANK.—I do not differ at all. This is a rigid penal statute, and we are required by law to give it a strict interpretation; and where a statute gives a form, as is here done for convictions, that form must be observed.

LORD MACKENZIE.—I am of the same opinion, particularly in consequence of the want of any specification in the conviction, of the place where the offence was committed. The attempt to refer back to the complaint, even if it were competent, would not do. For a conviction 'upon a complaint,' does not necessarily mean a conviction of all that is stated in the complaint.

LORD MONCREIFF.—Concurring as I do, it is not ne-

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cessary to go into a detail of the grounds of my opinion. But I wish to make this observation, that while we decide the case on these points, it is not to be considered that we think the other parts of the case as not deserving of very serious and deliberate attention. The statute in question is loosely drawn, and is highly penal. This Court must see that the proceedings under it are of a precise nature. The conviction here is not a conviction on the complaint. It does not find the complaint proved. It professes to convict of a specific offence, and yet leaves out the sting of that offence; namely, that the particular goods found, were articles which, when found, remained under suspicion in the minds of the Justices, of being purloined or embezzled. Then as to the place, we do not know from the conviction that the goods were found where the complaint alleges that they were. The statute gives a precise form for convictions, and it has not been observed. I am, therefore, for suspending the judgment.

LORD COCKBURN.—I am entirely of the same opinion. I particularly found my opinion on the fact, that the judgment of the Justices does not convict the party of any crime, because, after stating that he was guilty of a misdemeanour, they proceed to describe of what that misdemeanour consists—' in so far as he had in his possession' certain articles. Now, in order to constitute a good conviction, these articles must be materials, either proved or suspected *then*, to be embezzled.

The LORD JUSTICE-GENERAL.—It is not necessary that I should add anything. I adhere to the principle which I have expressed before in this Court, that where penal statutes are under consideration, we have no choice, but are obliged to be governed by the directions of the Legislature.

The Court accordingly, ' in respect the conviction com-
' plained of contains no specification of any offence falling
' under the statute founded on in the original complaint,
' and in respect the place of the alleged offence is not

'stated in the conviction, as required by the terms of the 'statute,' passed the bill, with expenses, in both Courts.[1]

JAMES MARSHALL, S.S.C.—JOHN ROGERS, S.S.C. *Agents.*

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ANDREW DUFF, Advocator—*Rutherfurd—Moncreiff.*

AGAINST

JAMES SIMPSON, Respondent—*Sol.-Gen. M'Neill—Inglis.*

ADVOCATION AND SUSPENSION—STATUTE 17TH GEO. III. c. 56.—A judgment under the above statute suspended, in respect the conviction contained no sufficient specification of any offence falling under the statute.

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The Advocator, a broker in Dunfermline, was brought before the Justices of the Peace for the county of Fife, by a complaint at the instance of the Respondent, under the statute 17th Geo. III. c. 56. The proceedings, up to the conviction, were similar to those detailed in the case of M'Innerney against Simpson, (*ante* p. 590.) The sentence of the Justices was in the following terms:—

'Dunfermline, in the county of Fife, to wit—Be it remembered, that 'on the 11th day of August, in the year of our Lord 1841, Andrew 'Duff, broker or merchant in Dunfermline, and residing in Moodie 'Street, in the town of Dunfermline and county of Fife, was convicted 'before us, James Morris, Alexander Colville, James Hunt, and George 'Birrell, Esquires, four of Her Majesty's Justices of the Peace in and 'for the said county of Fife, upon a complaint made upon oath against 'him by James Simpson, residing in Dunfermline, of a misdemeanour, 'in so far as he, the said Andrew Duff, had in his possession upon the '3d day of the said month of August, and year foresaid, and within 'his premises in Moodie Street aforesaid, a table-cover of worsted and 'cotton manufacture, marked No. 1, a bed-cover, marked No. 2, of 'the cotton and linen manufacture, two towels of linen manufacture, 'marked No. 4, and two hanks of worsted yarn, marked No. 19, all 'which had been, as suspected, purloined or embezzled, and he did not

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[1] The same judgment was given in the precisely similar case of Peter M'Innerney *against* James Simpson.

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'produce the party or parties duly entitled to dispose of the same 'from whom he bought or received the same, or give a satisfactory account of how he came by the same, contrary to the provisions of an 'act passed in the seventeenth year of his late Majesty George the III., 'chapter 56, the said James Hunt Esquire dissenting from the said 'conviction in so far as regards the said articles, Nos. 2, 4, and 19. 'Therefore it is considered and adjudged by us, the said Justices, that 'the said Andrew Duff hath for the said offence forfeited, it being a 'first offence, the sum of twenty pounds sterling; and we do hereby 'authorise and empower you,

'and each of you, our constables, in that behalf, to levy the 'said sum of twenty pounds sterling, by distress and sale of the goods 'and chattels of the said Andrew Duff, rendering to him the surplus, 'after deducting the expenses of the said distress and sale; the sale to 'take place not less than four nor more than eight days after the date 'of the distress; of which forfeiture one half shall be paid to the said 'James Simpson, the informer, and the other half to the treasurer to 'and for behoof of the Rolland Street School, Dunfermline; and if no 'sufficient distress can be found whereon to levy the said forfeiture of 'twenty pounds, then you are to report the same to us, in order that 'our warrant may issue forth for committing said offender to jail, in 'terms of said act. And we declare the whole of the above enumerated cloths and other articles to be forfeited, and disposed of in terms 'of the act; and authorize the clerk of Court to deliver to the said 'Andrew Duff the remainder of the said materials seized under the 'complaint. Given under our hands and seals the day and year first 'above mentioned.

(Signed) 'Jas. Morris, *J.P.*
'Jas. Hunt, *J.P.*
'Geo. Birrell, *J.P.*
'Alex. Colville, *J.P.*'

Duff presented to the Court a Bill of Advocation, Suspension, and Interdict, on the following grounds:—

(1.) That the information is incompetent and irregular in its terms, and does not afford sufficient ground for the subsequent procedure. (2.) That the account given by the Advocator in his declaration of how he came by the property in question, was satisfactory and sufficient, and the Advocator was not bound to enter upon any further proof of his innocence of the offences charged against him. (3.) That the proof was improperly taken and concluded, and the term circumduced without the Advocator having

declared his proof closed. And, (4.) that the evidence adduced ought to have satisfied the Court of the groundlessness of the charge made.

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Answers were lodged by the Respondent to the bill of advocation, and the case came to be advised this day.

RUTHERFURD, for the Advocator, pleaded,—Although the same objection as to the omission of the *locus delicti* does not apply as in the case of M'Innerney, the conviction does not contain a distinct and specific statement of the statutory offence. The complaint sets forth certain sections of the act. The sentence does not refer to these; nor does it bear that the articles found were suspected by the Justices of having been purloined or embezzled. It merely convicts the Advocator 'of a misdemeanour, in so 'far as he had in his possession, &c. a table-cover of 'worsted and cotton manufacture, marked No. 1; a bed-'cover, marked No. 2, of the cotton and linen manufac-'ture; two towels of linen manufacture, marked. No. 4; 'and two hanks of worsted yarn, marked No. 19,—*all* '*which had been, as suspected, purloined or embezzled,*' &c. It is not stated that the articles in question were *materials used in the manufactures* to which the act relates. 'Wrought materials' are not finished goods. Even if the term in the statute could have such a meaning, it could only apply to such materials, when purloined from the hands of the manufacturers employed to work them up. Suppose it had been proved to the satisfaction of the Justices, that the articles in question had all been stolen, not from a manufacturer, but from some one else, and suppose them satisfied that the accused party was the thief or the resetter,—this would not justify a conviction under the statute. These articles, in the first place, are not 'mate-'rials' in the sense of the statute; and, secondly, they are not set forth as such in the conviction.

The SOLICITOR-GENERAL, for the Respondent, answered,—The question is, whether the words of the sta-

No. 117. Duff v. Simpson, Dec. 6 1841.

Advocation and Susp.

tute, ‘ materials, whether mixed or unmixed, wrought or ‘ unwrought,’ are not sufficiently broad to cover a manufactured article, such as the table-cover, bed-cover, and towels. There can be no doubt as to ‘ hanks of yarn’ being *materials* of manufacture. And it cannot be held that the conviction is bad, if it extends to any one article not within the statute.

The LORD JUSTICE-GENERAL.—I must own I have a strong impression that the conviction is not good. What I desiderate is, that in regard to the wrought-up articles, they are not stated in the conviction to have been made out of *materials* within the meaning of the act. The only question is, whether it is sufficient, that among the articles found in the Advocator's possession, were ‘ two hanks of ‘ worsted yarn.’ If these had been the only articles referred to in the case, the point might perhaps have been different. But the conviction being vicious in regard to all the other and principal articles, the mention of this one does not appear to me sufficient to save it.

The LORD JUSTICE-CLERK.—I concur in holding that the judgment is bad. I cannot make the words of the tenth section of the statute applicable to finished manufactured goods, especially since the object of the Legislature was not to cover general cases of reset. I also agree in thinking, that if the conviction is not sustainable as to the principal articles referred to, we cannot divide it so as to hold a part good.

LORD MEADOWBANK.—I concur on the first point.

LORD MACKENZIE.—I come to the same result. I would have some difficulty in holding that materials still in the hands of the workmen, are not *materials*, because they have been worked up into finished goods. The 15th Section of the Act speaks of materials ‘ *wholly or in part* ‘ *wrought*, or begun to be wrought.’ Therefore, if it had been stated in the conviction, that the articles found were materials of manufacture, I should have been inclined to hold it sufficient. But there is no such statement. With regard to the ‘ two hanks of yarn,’ I agree with the Lord

Justice-Clerk, that we cannot divide the conviction. But even in regard to this article, it is not said to have been a *material*; and *yarn* is a finished article as well as a material.

LORD MONCREIFF.—I am of the same opinion. I think the conviction is bad, because it does not specify that the offence of the party was, having in his possession materials of manufacture suspected to be purloined or embezzled. As to the hanks of yarn, there are manufacturers who make nothing else but yarn. Such hanks are not in that case 'materials,' but completed goods of their own description. I do not say that they would not fall under the statute, but they should have been set forth to be materials of manufacture, and as such in the possession of the party. In regard to the question, whether we could hold the conviction good on one article and bad on the rest, I think we cannot divide it. It must go as it is to the Quarter Sessions, as the deliverance of the Justices.

LORD COCKBURN.—If this conviction were right upon one point and bad on three, I think that the effect to be given to it might be a point deserving of consideration. I give no opinion in regard to that, because I think the conviction bad on all points.

The Court, 'in respect the conviction complained of 'contains no sufficient specification of any offence falling 'under the statute founded on in the original complaint,' passed the bill, with expenses in both Courts.

JAMES MARSHALL, S.S.C.—JOHN ROGERS, S.S.C. *Agents.*

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[1] The same judgment was given in the precisely similar case of Owen *against* Simpson.

JAMES LEADBITTER, Suspender—*Sol.-Gen. M'Neill—A. M'Neill.*

AGAINST

The GARNKIRK COAL COMPANY, and ROBERT MILLER, their Agent and Manager, Respondents.—*Anderson.*

SUSPENSION AND LIBERATION—STATUTE 4th GEO. IV. c. 34.—1. A judgment under the above statute suspended, in respect of a decision of the Justices, in the course of the proof, finding certain evidence tendered for the defender incompetent.

2. Reasons of suspension founded on the want of proper instance in the complainers—the inapplicability of the statute—the irrelevancy and informality of the complaint—the insufficiency of the evidence—the fact of the conviction containing an abatement of the suspender's whole wages for the term of his imprisonment—and the circumstance of the same Justice not having acted thoughout the case, repelled.

No. 118. Leadbitter *v.* The Garnkirk Coal Company, Dec. 6 1841.

Suspension and Lib.

On the 3d of May a petition was presented to the Justices of the Peace for Lanarkshire, in name of 'the 'Garnkirk Coal Company, Fire-brick makers at Garn- 'kirk, and Robert Miller residing there, their agent and 'manager.'

The Petition, after quoting the third section of the Act 4th Geo. IV. c. 34.[1] continued—

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[1] 'That if any servant in husbandry or any artificer, calico-printer, 'handicraftsman, miner, collier, keelman, pitman, glassman, potter, la- 'bourer, or other person, shall contract with any person or persons 'whomsoever, to serve him, her, or them, for any time or times what- 'soever, or in any other manner, and shall not enter into or commence, 'his or her service according to his or her contract; (such contract 'being in writing and signed by the contracting parties,) or having en- 'tered into such service, shall absent himself or herself from his or her 'service, before the term of his or her contract, whether such contract 'shall be in writing or not in writing, shall be completed, or neglect to 'fulfil the same, or be guilty of any other misconduct or misdemeanour 'in the execution thereof, or otherwise respecting the same, then, and 'in every such case, it shall and may be lawful for *any* Justice of 'the Peace of the county or place where such servant in husbandry, 'artificer, calico-printer, handicraftsman, miner, collier, keelman, pit- 'man, glassman, potter, labourer, or other person, shall have so con-

No. 118. Leadbitter v. The Garnkirk Coal Company, Dec. 6 1841.

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'That on or about the day of August or September 1840, 'James Leadbitter, presently residing at Heathfield near Garnkirk, en- 'tered into the employment of the petitioners as a waggoner, for an in- 'definite period of time, but subject to the rules and regulations of 'their works, whereby it is *inter alia* laid down, 'That no one shall '' be allowed to leave the employment of the Company without '' giving two weeks' warning, and the same shall be given by the ma- '' nagers to those employed,' as a printed copy of the said rules here- 'with produced will instruct. That printed copies of these rules are 'affixed in conspicuous places in the Petitioners' works, and the said 'James Leadbitter perused or had his attention drawn to them, or other- 'wise bound himself to accede thereto, but notwithstanding whereof, the 'said James Leadbitter on or about the 16th day of April 1841, desert- 'ed the petitioners' service, without giving the warning prescribed by 'the said rules, or any warning whatever, and has not since returned: 'That upon the 19th day of April last, the petitioners by their manager 'foresaid, addressed to the said James Leadbitter the letter, of which 'the following is a copy:—'Garnkirk Works, April 19th 1841. James '' Leadbitter, waggoner, Sir, I am desired to inform you, that unless

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'tracted, or be employed, or be found, and *such* Justice is hereby au- 'thorised and empowered upon complaint thereof, made upon oath to 'him by the person or persons, or any of them with whom such servant 'in husbandry, artificer, calico-printer, handicraftsman, miner, collier, 'keelman, pitman, glassman, potter, labourer, or other person, shall have 'so contracted, or by his, her, or their steward, manager, or agent, 'which oath such Justice is hereby empowered to administer, to issue his 'warrant for the apprehending every such servant in husbandry, artifi- 'cer, calico-printer, handicraftsman, miner, collier, keelman, pitman, 'glassman, potter, labourer, or other person, and to examine into the 'nature of the complaint, and if it shall appear to such Justice that any 'such servant in husbandry, artificer, calico-printer, handicraftsman, 'miner, collier, keelman, pitman, glassman, potter, labourer, or other 'person, shall not have fulfilled such contract, or hath been guilty of 'any other misconduct or misdemeanour as aforesaid; it shall and may 'be lawful for such Justice to commit every such person to the house of 'correction, there to remain and be held to hard labour for a reasonable 'time, not exceeding three months, and to abate a proportional part of 'his or her wages for and during such period as he or she shall be so 'confined in the house of correction, or *in lieu thereof*, to punish the 'offender by abating the whole or any part of his or her wages, or to 'discharge such servant in husbandry, artificer, calico-printer, handi- 'craftsman, miner, collier, keelman, pitman, glassman, potter, labourer, 'or other person, from his or her contract, service or employment, 'which discharge shall be given under the hand of such Justice gratis.'

No. 118. Leadbitter v. The Garnkirk Coal Company, Dec. 6 1841.

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'' you come back here within two days from this date and work your '' lawful warning of two weeks, (agreeable to the rules of the works,) '' you will be proceeded against, and enforced to do so or punished. '' Your place will be kept vacant for you for the above time, I am &c.' 'That to this letter the said James Leadbitter paid no attention. That 'the said James Leadbitter has therefore committed a breach of his 'engagement, and of the foresaid rules and regulations, and has contra- 'vened the provisions, and incurred the penalties provided by the be- 'fore recited statute, in consequence of which the present application 'becomes necessary. May it therefore please your Honours, to take the 'petitioner Robert Miller's oath as to the truth of the facts above nar- 'rated, and thereupon to grant warrant to officers of court and other 'executors of the law, to search for, and apprehend the person of the 'said James Leadbitter, and to bring him before you for examination, 'and thereafter to commit the said James Leadbitter, to the house of 'correction, bridewell, or public prison of Glasgow, there to remain, 'and be held at hard labour for a reasonable time, not exceeding three 'months, and to abate a proportional part of his wages for, and during 'such period as he shall be so confined, or in lieu thereof to punish the 'said James Leadbitter, by abating the whole or any part of his wages, '*or to punish him at common law,* as to your Honours shall seem fit; 'and to recommend to other Magistrates to give effect to the said war- 'rants by indorsation when necessary. According to justice.—(Signed) '—Robert Miller.'

The Petitioner, Miller, having made oath to the truth of the complaint, Leadbitter was apprehended and brought before the Justices. The following procedure subsequently took place :—

'At Glasgow, the 12th day of May 1841 years, in presence of 'Robert Gray, Esq., one of Her Majesty's Justices of the Peace for 'Lanarkshire. In the petition of the Garnkirk Coal Company and 'Robert Miller, against James Leadbitter. Present,—parties and their 'agents. Compeared the said James Leadbitter, to whom the petition 'was read over.' 'Whereupon the defender's agent objected to the 'said James Leadbitter undergoing any examination, under the war- 'rant, in regard that the words August or September, in the sixth page 'of the petition, had been inserted since the warrant was obtained, and 'the defender brought in custody to the office, which statement was 'offered to be verified on the instant, by the officer who is now present.' 'Answered,—The statement as to the filling up the words August or 'September is not true, and even if it were, the filling up of these words 'does not vitiate the proceedings, as the complainer was entitled to fill 'up the date, or, at the utmost, the date may be held as *pro non scripto,*

'and this is not the proper time, nor the proper court, in which to state 'that objection; moreover, the evidence offered is insufficient.' 'In 'respect that the complainers now agree to hold the words August or 'September on the sixth page of the petition, as *pro non scripto*, repels 'the objection, and appoints the examination to proceed,—(Signed)— 'Robert Gray, J.P.' 'The defender further objected, that the com- 'plaint did not set forth the date of the entering into the employment 'further than the year 1840, and also that it does not set forth that the 'defender contracted or agreed to serve with the pursuers for any fix- 'ed or specified period whatever.' 'The complainers answered, that 'the date of entering on the employment is sufficiently set forth, and 'that it is not necessary by the statute to set forth a fixed or specific pe- 'riod of agreement. The petition distinctly states that the defender 'entered into the service of the complainers, and that he was bound, 'before leaving it, to give a fortnight's warning. The complainers 'therefore, could not condescend on any specific period of agreement, 'the endurance of the agreement depending on the will of either to give 'or take a fortnight's warning. Moreover, the statute fixes no specific 'time for the endurance of the contract, but provides, after alluding to 'a contract, the endurance of which may be fixed, for such a case as 'the present, by the words, for any time or times whatsoever, or in any 'other manner.' 'The justice having considered the foregoing objec- 'tion and answers, and heard parties, repels the objection, and allows 'the examination to proceed,—(Signed)—Robert Gray, J.P.' 'And 'the defender being interrogated, declares and declines to answer any 'question whatever, by the advice of his agent. Interrogated, were 'you in the service of the complainers? Declares and declines to an- 'swer any question. Interrogated when the declarant left said service? 'whether he gave any warning before leaving the complainer's service? 'when he left said service? is he aware what is the rule at the com- 'plainers' work as to warning between the master and man? whether at 'the time of his engagement he was to give or take a fortnight's warn- 'ing? are there printed rules of the work hung up at conspicuous places 'of it? whether he perused any of these rules himself? did he see the 'rules, a copy of which is now produced? does he know that these 'rules are acted on at the work, and did he bind himself to act 'upon them too? did he get a letter on or about the 19th April last, 'of which a copy is quoted in the petition, and if so, to produce it? 'Declares and declines to answer any question whatever. All which 'he declares to be truth, and declares he cannot write.—(Signed) Ro- 'bert Gray, J.P.'

A proof was afterwards led, in the course of which the following evidence was adduced for the defender :—

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Archibald Ker Murray, manager at the Garnkirk Company Works, who being solemnly sworn, purged of malice and partial counsel, and interrogated, Depones that he takes charge of paying the workmen's wages. Interrogated whether the defender received his wages as they became due from the deponent as the pursuers' manager, in cash, or by orders for goods on the store kept by the pursuers at their works?

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To which the complainers objected that the question is incompetent, seeing that it forms no defence against an action for desertion, that a servant has not been regularly paid his wages, and even if the question as to the payment of wages were competent, the defender is not entitled to ask whether these were paid in money or by orders for goods. The question must be confined simply to this, were the wages paid or not?

Answered for the defender, that the question is competent, in respect, if answered in the affirmative, it may form a ground in defence, or as tending to mitigate punishment.

The Justice having considered the objections and answers, sustains the objections.

The following sentence was pronounced :—

'*Glasgow*, 14*th May* 1841.—Having resumed consideration of this 'petition, procedure thereon, declaration of James Leadbitter design-'ed in said petition complained upon, proofs for the parties, note for 'the complainers renouncing proof, and whole process; and the defen-'der having declared that he had no further proof to produce, circum-'duces the term for proving against both parties. Finds the complaint 'sufficiently instructed, and that the said James Leadbitter has com-'mitted a breach of the statute founded on, and convicts the said James 'Leadbitter accordingly. Therefore grants warrant to officers of 'Court to commit the said James Leadbitter to the House of Correc-'tion, now denominated the Prison of Glasgow, there to remain, and 'to be held to hard labour for ten days from this date; *and abates the* '*wages due, and to fall due to the said James Leadbitter* during the said 'period, and decerns.—(Signed) J. Douglas, Clerk. (Signed) Robert 'Gray, J.P.'

Leadbitter having been incarcerated under this sentence, presented to the Court a Bill of Suspension and Liberation on the following grounds :—

(1.) There was no proper instance under which the com-

plaint could be sustained. The Garnkirk Coal Company is not a body known or recognised in law. They have no right to sue under any such name or designation. The manager of such a company has no higher right. He is the mere delegate of a body whose authority he cannot validly state, because that body is unknown to the law. (2.) The Suspender being a person employed on day's wages, and exercising no particular craft, did not fall under the provisions of the statute. (3.) The complaint did not aver any relevant or sufficient grounds for bringing the Suspender within the provisions of the act, or for warranting the interference of the Justices at common law. (4.) The complaint did not relevantly or competently aver any breach of a lawful engagement. (5.) The statute was clearly inapplicable to the case alleged, inasmuch as it was not pretended that the Suspender was engaged for any period whatever. (6.) The petition was utterly void, in respect of the superinductions as to dates. (7.) There was no kind of evidence that the Suspender had violated even the agreement alleged. There was no proof that he had gone away without giving due notice to the party entitled to such notice. He could not give notice to the alleged company, which had no legal existence, and no legal representative;—and, for any thing that appeared in evidence, he had given the notice pretended to be required to the petitioner Miller. (8.) The Suspender was prevented from proving the mode by which the wages were paid at this work. It so happened that in this respect the company and its managers have for some time past been acting in direct violation of law, by paying the wages according to the truck system. They are thus guilty of a direct breach of their engagement to the workmen employed under them, and are therefore not entitled to sue any one for declining to continue performance of a contract, direct or implied—the counterpart of which is so flagrantly violated by themselves. On this ground alone the conviction is invalid—there being no proposition better established, than that the exclusion of competent and relevant evidence vitiates a

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sentence pronounced in a criminal complaint. (9.) The conviction is obviously contrary to the provisions of the statute, inasmuch as it awards not only a term of imprisonment, but the abatement of the whole of the wages for the term of the imprisonment. (10.) The procedure is farther inept, inasmuch as it was not conducted by the same Justice throughout.

It was answered for the Respondents,—

(1.) Even supposing the action could not be maintained by the Garnkirk Coal Company, under their description or designation, still the introduction of that firm could not vitiate or invalidate the proceedings. It could only be held as surplusage. The Respondent Miller, 'their *agent* 'and *manager*,' was the party who engaged the Suspender;—he it was who deponed to the verity of the statements in the complaint under and in terms of the statute;[1] and his name being sufficiently set forth in the petition as *a complainer*, in his character of '*agent* and *ma*-'*nager*' of the company, the instance is perfectly good, and the terms of the statute have been fully complied with.

(2.) The statute is not confined to artificers: it embraces servants in husbandry, artificers, calico-printers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, labourers, '*or other persons*.'

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[1] § 1. 'That it shall and may be lawful, *not only* for any master or 'mistress, *but also* for his or her steward, *manager*, or *agent*, to make 'complaint upon oath against any apprentice, *within the meaning of the* '*before recited acts*, (20 Geo. II. c. 19, and 6 Geo. III. c. 25 and 29,) 'to any Justice of the Peace of the county or place where such appren-'tice shall be employed, of or for any misconduct or ill behaviour of 'any such apprentice; or if such apprentice shall have absconded it 'shall be lawful for any Justice of the Peace of the county or place 'where such apprentice shall be found, or where such apprentice shall 'have been employed; and any such Justice is hereby empowered, '*upon complaint* thereof made upon oath by such master, mistress, 'steward, *manager*, *or agent*, which oath the said Justice is hereby em-'powered to administer, to issue his warrant for apprehending every 'such apprentice.'

(3.) The grounds of complaint are properly set forth in the complaint, and have been found '*sufficiently in-structed.*'

(4. and 5.) In reply to the allegations, that the Respondents did not relevantly or competently aver any breach of a lawful engagement, and that the statute was inapplicable to cases of indefinite hiring, reference is made to the complaint.

(6.) The sixth ground of suspension, that the petition was utterly void, in respect of the superinduction as to dates, is also untenable. There is no evidence that the words August or September *were* superinduced after the warrant was granted on the complaint: it is the mere *ipse dixit* of the Suspender's agent. Although the Respondents' agent agreed to delete these words, for the sake of preventing quibbling, yet it does not follow that the words had been actually superinduced; neither will it follow, because the words have been delete, that the complaint was erroneous.

(7. and 8.) The statements contained in the seventh and eighth reasons of suspension are wholly unfounded, and are denied.

(9.) The conviction is in conformity with the statute. But granting, for the sake of argument, that the Justice had no power to abate the *whole* of the wages, the Respondents would ask, Has the Suspender suffered any pecuniary loss in consequence? He has not, nor can it be pretended that he has. Nothing was due to him at the time of his imprisonment. The wages abated being for the *ten days of imprisonment,* it surely will not be maintained that he had any right or title to wages during that period, while, at the same time, the Respondents were deprived of his services, and that, too, through his own misconduct.

(10.) It was not at all requisite or necessary for the *same* Justice who granted the preliminary warrant, to hear and determine the complaint, and to punish the offender. He *may* or he may *not* hear the cause to an end; but it is equally competent for *any* Justice of the county or place

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where the party complained of shall be found, or where he shall have been employed, to do so.

The Respondents maintained farther,—1. The present bill of suspension and liberation is incompetent, in respect the statute declares every 'order or determination' of the Justice or Justices acting under its authority, to be *final* and *conclusive*.

2. The instance was properly laid; and as no objection was stated thereagainst in the inferior court, the Suspender is now barred from objecting.

3. Suppose it shall be held that a Company is not entitled to sue under its *descriptive name* alone, the complaint is fully authorised and competently laid under the statute, at the instance of the Respondent Mr. Miller, as the 'agent and manager' of the other Respondents; and the insertion of the Company as complainers can only be held as surplusage.

4. The proceedings in the inferior court were conducted in a proper and regular manner, and in the conviction and punishment the Justice acted within the powers of the act.

5. The term of imprisonment having expired, and the Suspender having been liberated before the bill was presented, the bill was uncalled for and unnecessary.

The case came to be advised this day.

A. M'NEILL, for the Suspender, argued, that the judgment of the Justices must be set aside, on the grounds stated in the Bill of Suspension. The plea founded on the alleged finality of the proceedings before the Justices, is utterly untenable. The way in which the 5th section of the statute[1] is worded, shews that its only object was to

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[1] 'That every Justice or Justices of the Peace, before whom any 'complaint shall be made, *in pursuance of*' the acts 20th Geo. II. c. 19, or 31st Geo. II. c. 11., 'shall and may order the amount of the wages 'that shall appear due to any servants in husbandry, artificers, labourers, or other person named in the said acts, or either of them, to be

take away the appeal to the Quarter Sessions, which was competent under the act 20th Geo. II. c. 19.[1] Much more express words would be required to exclude the jurisdiction of the Court of Justiciary.

No. 118. Leadhitter v. The Garnkirk Coal Company, Dec. 6 1841. Suspension and Lib.

The Court intimated, that the only point on which they required argument, was the effect of the decision of the Justices, sustaining the objection to the competency of the question relative to the mode of paying the Suspender's wages.

ANDERSON, for the Respondent,—argued, that the proceedings are not to be set aside, even if the Justices refused to admit a question which was competent. No intimation was made on the part of the Suspender, that the question objected to was to be followed up by proof that he objected to the mode of payment adopted. And without such objection having been made, even if the wages were paid by the truck system, that was no ground for the Suspender deserting his service. But, moreover, this reason of suspension is incompetent, as the finality of the judgment

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'paid to the person entitled thereto, within such period as the said Jus-
'tice or Justices shall think proper; and in case of refusal or non-pay-
'ment thereof, shall and may levy the same by distress and sale, in
'manner directed by the said first-mentioned act; and every order or
'determination *of such Justice or Justices made under this act shall be*
'*final and conclusive, any thing in either of the said acts contained to the*
'*contrary in any wise notwithstanding.*'

[1] The provision of this act on the subject is as follows:—(§ 5.) 'That
'if any person or persons shall think himself, herself, or themselves ag-
'grieved by such determination, order, or warrant of such Justice or
'Justices as aforesaid, (save and except any order or commitment,) he,
'she, or they may appeal to the next General Quarter Sessions of the
'Peace to be held for the county, riding, liberty, city, town corporate,
'or place where such determination or order shall be made, which said
'next General Quarter Sessions is hereby empowered to hear, and fi-
'nally determine the same, and to give and award such costs to any of
'the respective persons, Appellant or Respondent, as the said Sessions
'shall judge reasonable, not exceeding forty shillings, the same to be
'levied by distress and sale in manner before mentioned.'

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of the Justices is expressly declared in the very terms which are employed for that purpose in all British acts.

The Court, 'in respect the question relative to the 'mode of paying the Suspender's wages was objected to 'in the Inferior Court, and not allowed to be put,' passed the bill, with modified expenses.[1]

WILLIAM DUNCAN, S.S.C.—THOMAS SPROT, W.S. *Agents.*

Dec. 21 1841.

GLASGOW CIRCUIT.

Winter 1841.

Judges.—THE LORD JUSTICE-CLERK AND LORD MACKENZIE.

HER MAJESTY'S ADVOCATE.—*Mark Napier.*

AGAINST

JAMES DAVIDSON.—*Arkley.*

HOUSEBREAKING—AGGRAVATION—EVIDENCE—1. A charge of housebreaking, by raising the sash of a window, abandoned, on the suggestion of the Court, after proof that the window in question was frequently used as an ordinary mode of entry.

2. The substantive aggravation of opening lockfast places may be proved by the evidence of a single witness.

No. 119. James Davidson.

Theft, &c.

JAMES DAVIDSON was charged with Theft, more especially when committed by means of housebreaking, and by opening lockfast places.

He pleaded not guilty, and a proof was led.

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[1] It will be observed that the decision reported in the text differs in some degree from the view formerly taken by the Court, of the provisions of the act 4th Geo. IV. c. 34. See the cases of Crawford *v.* Wilson and Jamesons, Nov. 19, 1838, (*ante* p. 200), and Milloy *v.* Sneddon, May 20, 1839, (p. 381.)

1. The entry of the house was charged to have been effected by 'raising or opening a sash of a window of the 'said house.' It was proved that this window was frequently used as a mode of entry, both by the occupier of the house, and (with her permission) by the pannel, who was a lodger in the house.

In these circumstances, the ADVOCATE-DEPUTE, at the suggestion of the Court, passed from the aggravation of housebreaking.

2. One witness only deponed to the fact of the chest from which the stolen articles were taken having been locked.

ARKLEY, for the pannel,—argued, that the aggravation of opening lock-fast places was not proved, (cases of John Davidson, Perth, April 24, 1838. Swinton, Vol. II. p. 102, and Conner and Dougharty, Glasgow, Sept. 20, 1838. Ib. p. 194.)

The LORD JUSTICE-CLERK, in charging the Jury, stated, as the opinion of Lord Mackenzie and himself, that it is now fixed law that the aggravation in question may be proved by the evidence of a single witness. An opposite decision seems on one occasion to have been given. But the law is now beyond a doubt.

The Jury unanimously found the pannel guilty, but recommended him to the leniency of the Court.

In respect of which verdict of Assize, he was sentenced to be imprisoned in the prison of Paisley, for the period of two calendar months.

Dec. 23
1841.

HER MAJESTY'S ADVOCATE—*Mark Napier*—*W. S. Walker.*

AGAINST

ALEXANDER ALEXANDER AND JAMES ALEXANDER.—*Ross.*

ASSAULT ON A REVENUE OFFICER—INDICTMENT.—An Indictment for assault, especially when committed on an officer of the revenue in the execution of his duty, objected to, in respect it was not averred in the minor proposition that the pannel knew him to be such, and that there was no statement equivalent to such an averment,—and the objection certified to the High Court.

No. 120. Alexander and James Alexander, Glasgow.

ALEXANDER ALEXANDER and JAMES ALEXANDER were charged with Assault, especially when committed on an officer of the revenue in the execution of his duty,

Assault,&c.

IN SO FAR AS, upon the night of the 10th, or morning of the 11th day of May 1841, the said Alexander Alexander and James Alexander, or one or other of them, or some other person or persons to the prosecutor unknown, having illegally removed or carried away three or thereby casks, and four or thereby bags, from on board the ship Hallyards, then lying in the river or Firth of Clyde, and at or near that part thereof called 'The Tail of the Bank,' nearly opposite to the town of Greenock, to a small boat alongside of the said ship, with the intention of conveying the same ashore; and William Polson, then and now or lately tide-waiter of Customs, then and now or lately residing in or near York Street, in or near the Glebe of Greenock, with Jacobina Polson, a widow, being then stationed on board the said ship for the protection of the revenue and the prevention of smuggling, and having, in the execution of his duty, interfered to prevent them from carrying off the said casks and bags, at least until he had inspected the same; or otherwise the said William Polson, time and place foresaid, having observed three or thereby casks, and four or thereby bags lying in the said small boat alongside of the said ship, and which casks or bags he had reason to suspect had been removed from the said ship for the purpose of being smuggled or illegally conveyed on shore: and having, in the exercise of his duty aforesaid, entered the said small boat from the foresaid ship, and proceeded to examine the said casks and bags, and attempted to remove or detain the same, the said Alexander Alexander and James Alexander did, both and each, or one or other of them, time above libelled, and within the said small boat lying alongside of the said ship, as above libelled, wickedly and feloniously attack and assault the said William Polson, and did seize him by the breast and throw him down

in the foresaid small boat, and did cast off the boat from the ship, and did, both and each or one or other of them, aided and assisted by some other person or persons to the Prosecutor unknown, immediately thereafter convey the said William Polson, in a lawless and forcible manner, and against his will, in the foresaid small boat, to a part of the foresaid river or Firth of Clyde, in the vicinity of the island of Inchgreen, about a mile below Port-Glasgow; and did, both and each or one or other of them, then and there, forcibly push or throw him into the water, in which he was immersed to the middle of his body, or nearly so, and did with an oar, or with some other weapon to the prosecutor unknown, strike him a blow on the head, and did leave him alone in the water in a dark and boisterous night; by all which the said William Polson was obstructed and assaulted in the execution of his duty as an officer of the revenue, and was much agitated and alarmed.

No. 120. Alexander and James Alexander, Glasgow; Dec. 23 1841. — Assault, &c.

Ross, for the pannels, objected to the relevancy of the Indictment, so far as regarded the aggravation of the assault having been committed on an officer of the revenue in the execution of his duty, because it was not averred in the minor proposition that the pannels knew him to be an officer of the revenue in the execution of his duty, and there was no statement whatever in the Indictment equivalent to such an averment.

The ADVOCATE-DEPUTE having been heard in answer, the Lord Justice-Clerk and Lord Mackenzie certified the case to the High Court of Justiciary.[1]

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[1] The case came before the High Court on the 22d of January 1842. A report of the discussion which then took place will be found in Broun's Reports. The Court were equally divided as to the relevancy of the Indictment,—the Lord Justice-General, the Lord Justice-Clerk, and Lord Medwyn holding that it was good, while Lords Mackenzie, Moncreiff, and Cockburn thought it bad, in so far as the aggravation was concerned. Since, by the constitution of the Court, the presiding Judge, in such circumstances, has no voice in the judgment, the objection was sustained, and the pannels were re-committed under a new warrant.

HER MAJESTY'S ADVOCATE—*Mark Napier.*

AGAINST

EUPHEMIA MUIR, GEORGE DUNSMORE, JAMES DUNSMORE, and MATTHEW LANG—*Broun—W. S. Walker—Tennent.*

ROBBERY.—Four pannels convicted of assault and robbery, sentenced to imprisonment for two years and a half.

No. 121. Euphemia Muir and others, Glasgow, Dec. 23 1841.

EUPHEMIA MUIR, GEORGE DUNSMORE, JAMES DUNSMORE, and MATTHEW LANG, were charged with Assault as also Robbery,

Robbery.

IN SO FAR AS, on the night of the 17th, or morning of the 18th of May 1841, in or near Chapel Street, also in or near High Street, also in or near North Bridge Street, also in or near Bell Street, or in or near one or other of the places aforesaid, being all in Airdrie, in the parish of New Monkland and county of Lanark, the said Euphemia Muir, George Dunsmore, James Dunsmore, and Matthew Lang, did, all and each, or one or more of them, wickedly and feloniously attack and assault Sarah Flowers or Turnbull, wife of, and then and now or lately residing with, Robert Turnbull, then in the employment of William Reid, tacksman of Rawyards toll-bar, in the parish of New Monkland and county of Lanark, and now or lately employed as a weaver, and now or lately residing in Nelson's Land, East John Street, in or near Glasgow; and did, all and each, or one or more of them, seize hold of the said Sarah Flowers or Turnbull, and did surround and jostle her, and did attempt to rob her of her bonnet and shawl, and of other clothes and property upon her person, and did put her into bodily terror, and did repeatedly throw her to the ground; and the said Sarah Flowers or Turnbull, having taken refuge from this their continued and violent attack upon her person and property, in the house in or near Bell Street aforesaid, then and now or lately occupied by George Fraser, change-house keeper there, the said Euphemia Muir, George Dunsmore, James Dunsmore, and Matthew Lang, did wickedly and feloniously attempt to force their way into the said house; and the said Sarah Flowers or Turnbull having been compelled to quit the said house, they all of them, or one or more of them, did again, time above libelled, wickedly and feloniously attack and assault the said Sarah Flowers or Turnbull, in or near Bell Street aforesaid, and in or near Aitcheson Street, or that part of the Old Town of Airdrie to the westward of the Head of Bell Street aforesaid; and also in or near a bye-road or loan leading from the Old Town of Airdrie aforesaid, to a field called Lady Well Park, and also in or near the said field called Lady Well Park, all situated in or near Airdrie, and in the parish of New Monkland and county of Lanark; and did then and there

surround and jostle the said Sarah Flowers or Turnbull, and did seize her by the throat, and throw her to the ground, and did hold her violently there, and did attempt to choke her; and did then and there wickedly and feloniously, and by force and violence, take from the pocket or person of the said Sarah Flowers or Turnbull, and did rob her of one pound four shillings and sixpence, or thereby, in silver money; fourpence halfpenny, or thereby, in copper money; an umbrella, a white jane pocket; a pass-book or paper-book; a box; two shawls; and four rows of red coral beads, the property, or in the lawful possession, of the said Robert Turnbull, or of the said Sarah Flowers or Turnbull.

No. 121. Euphemia Muir and others, Glasgow, Dec. 23 1841. Robbery.

The pannels pleaded not guilty, and a proof was led.

The Jury unanimously found them guilty.

The Lord Justice-Clerk stated, that there had never yet occurred a case of robbery which had not been visited with the punishment of transportation; and that it was with great hesitation that he proposed, in the present case, a substitute for that punishment. Hoping, however, that the reformation of the pannels was not hopeless, he proposed a sentence of lengthened imprisonment.

The pannels were accordingly sentenced to be imprisoned in the prison of Hamilton, for the period of two years and six months.

Her Majesty's Advocate.—*Mark Napier.*

AGAINST

Francis Docherty, William M'Lure, James Rennicks, John Rennicks, and James Fram or Frame—*Broun—Tennent.*

Mobbing and Rioting.—An Indictment for Mobbing and Rioting found irrelevant, in respect that no common purpose was set forth.

Francis Docherty, William M'Lure, James Rennicks, John Rennicks, and James Fram or Frame, No. 122. Francis Docherty and others.

No. 122. Francis Docherty and others, Glasgow, Dec. 23 1841.

Mobbing and Rioting.

were charged with Mobbing, Rioting, and Breach of the Peace: As also Assault, especially when committed to the effusion of the blood and the serious injury of the person, and more especially when committed by a person who has been previously convicted of Assault: As also Riotous, Wilful, and Malicious Mischief,

In so far as, late on the night of the 2d, and early on the morning of the 3d of October 1841, a mob or number of evil-disposed and disorderly persons did riotously and tumultuously and unlawfully assemble or convocate in or near Wardrop's Place, New Dundyvan Road, in the parish of Old Monkland and county of Lanark, some of them armed with pokers and tongs, and one of them brandishing a knife in his hand, and did conduct themselves in a riotous and disorderly manner, to the terror and alarm of the lieges, and the disturbance of the public peace, and did at or near to the house or shop in or near Wardrop's Place aforesaid, then and now or lately occupied by David Chrystal, then and now or lately baker, grocer, and spirit-dealer, and residing there, wickedly and feloniously attack and assault Thomas Baker, then and now or lately puddler, and then and now or lately residing in or near Dundyvan Square, in the parish and county aforesaid, with James Matlocks, now or lately heater, and did strike him a severe blow upon the head or other part of his person, with a stone or other missile, or with some lethal weapon or instrument to the prosecutor unknown, whereby he was felled to the ground, and did, while he lay upon the ground, strike him a severe blow or kick upon the side or other part of the person, by which, or part thereof, he was cut, bruised, and wounded to the effusion of his blood and the serious injury of his person. Farther, some of the said mob, to the number of seven persons or thereby, having forced their way into or entered the house or shop aforesaid, then and now or lately occupied by the said David Chrystal, did then and there wickedly and feloniously attack and assault the said David Chrystal, and did strike him a blow upon the head or other part of his body, to the injury of his person: And the said persons having been thereafter pushed out or removed from the said house or shop, the said mob or number of evil disposed and disorderly persons did, in a riotous and outrageous manner, attack the said house or shop, then and now or lately occupied by the said David Chrystal, and the house or shop in or near Wardrop's Place aforesaid, then and now or lately occupied by John Fletcher, then and now or lately spirit-dealer, and residing there, and the house in or near Wardrop's Place aforesaid, then and now or lately occupied by John M'Laren, then and now or lately wright, and residing there, and did riotously, wilfully, maliciously, and unlawfully, pelt at the said several houses, or one or more of them, with stones, and slag, and other mis-

No. 122. Francis Docherty and others, Glasgow, Dec. 23 1841.

Mobbing and Rioting.

siles, and did break a great number of panes of glass in the windows and doors of the said several houses and shops, and did otherwise injure and destroy the said several houses and shops; and part of the stones, and slag, and other missiles, so thrown, did enter the said houses and shops, or one or more of them, to the terror and alarm of the inmates, and the destruction of property within the same; and the said mob or number of evil disposed persons did also, then and there, wickedly and feloniously, attack and assault several peaceably disposed persons, and did throw stones, slag, and other missiles, at them, and did knock them, or one or more of them, to the ground, whereby they were cut, bruised, and wounded, or one or more of them, to the effusion of their blood and injury of their persons; and more particularly did attack and assault, as last above libelled, Jonathan Shelton, then and now or lately puddler and residing at or near Dundyvan, in the parish and county aforesaid; Daniel Cooper, then and now or lately puddler, and residing at Dundyvan aforesaid; Ebenezer Owens, then and now or lately furnace-man, and residing at Dundyvan aforesaid; Thomas Happle, now or lately blacksmith, and residing at Langloan, in the parish and county aforesaid; John Blair, now or lately baker in the employment of, and residing with, David Chrystal aforesaid; Daniel Plant, now or lately puddler, and now or lately residing at or near Dundyvan Works, in the parish and county aforesaid, and Stephen Rowlands, now or lately roller, and now or lately residing in or near Dundyvan Square, in the parish and county aforesaid, with Samuel Thomson, now or lately roller: and the said Francis Docherty, William M'Lure, James Rennicks, John Rennicks, and James Fram or Frame, did, all and each, or one or more of them form part of said mob or number of disorderly and evil-disposed persons, and were present at, aiding and abetting, and actively engaged with the said mob in their unlawful, riotous, and tumultuous proceedings above libelled, and in the assaults above libelled, and in the acts of riotous, and wilful, and malicious mischief above libelled, or one or more of them.

BROUN, for the pannels, objected to the relevancy of the charge of assault upon David Chrystal, set forth in the Indictment.—It may be competent to libel that acts of assault, breach of the peace, and malicious mischief, were committed by the mob, and that the pannels were guilty of these crimes, because they were present with the mob. But the assault in question is not relevantly laid, because it is stated to have been committed by '*some of the mob*, to the number of seven persons.'

No. 122. Francis Docherty and others, Glasgow, Dec. 23 1841.

Mobbing and Rioting.

The LORD JUSTICE-CLERK.[1]—It is not necessary that I should give any judgment on the objection stated for the pannels, because I am of opinion—in which Lord Mackenzie concurs—that there is another objection of a more general nature applicable to the whole Indictment. Mobbing is not simply a breach of the peace by a number of persons; to constitute that crime, it is absolutely necessary that there should be a common object. It is not necessary that this object should have been preconcerted. It may have been taken up after the rioting began, but there must have existed a lawless and violent purpose, and in a combined form. And it is absolutely necessary, in order to make a relevant charge of mobbing, that the Indictment should set forth on the face of it, what this common object was. Acts of assault may be relevantly charged as mobbing, if they are done in furtherance of the common object. But, unless that object is set forth, it is impossible to judge whether such acts are relevantly laid. It may be that this Indictment has been drawn after a style which has been employed before, without objection. But it is not less the duty of a Judge to object to it now, although the pannel's counsel may not consider it to be his interest to insist on an unlawful purpose being attributed to his client.

The Indictment was accordingly found irrelevant, and, on the motion of the Advocate-depute, the diet against the pannels was deserted *pro loco et tempore*.

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[1] His Lordship was alone on the bench, Lord Mackenzie having left the Court in consequence of indisposition.

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ALIBI.

It is not sufficient that a special defence, lodged as a foundation for a plea of *alibi*, state that the pannel was not, during a particular part of the day libelled, at or near the place libelled as the *locus delicti*, unless it states or refers to the places where he alleges that he actually was. Francis Gairdner and others, July 18, 1838, p. 180.

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ASSAULT ON A REVENUE OFFICER.

An Indictment for assault, especially when committed on an officer of the revenue in the execution of his duty, objected to, in respect it was not averred in the minor proposition, that the pannel knew him to be such, and that there was no statement equivalent to such an averment—and the objection certified to the High Court. Alexander Alexander and James Alexander, Glasgow, Dec. 23, 1841, p. 632.

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ASSIZE—*Continued.*

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2. Application having been made to the Court by petition, in name of the Lord Advocate, for forfeiture of the bail bond lodged for the appearance of a party against whom sentence of fugitation had been passed at a former diet of Court—the cautioner allowed a proof, that the party was not legally summoned. James Laird, July 18, 1838, p. 178.

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A certificate of previous good character having been produced by a pannel in mitigation of punishment, which, from evidence before the Court, appeared to contain, if not a false statement, at least a suppression of the truth, the granter of the certificate ordered to attend at the bar, but dismissed, after an explanation which was considered satisfactory. James Nimmo and James Forsyth, March 13, 1839, p. 338.

CITATION.

1. (1.) An objection having been taken to the citation of a party, that he had lost his domicile at the place where the copy of the libel was left for him, and a proof having been led, which raised a presumption that he was furth of the kingdom,—held that appearance could not be made for him without a mandate, and sentence of fugitation accordingly passed. (2.) Question,—whether the motion for forfeiture of the bail bond could be insisted in under these circumstances. John Laird, February 19, 1838, p. 26.

2. Application having been made to the Court by petition, in name of the Lord Advocate, for forfeiture of the bail bond lodged for the appearance of a party against whom sentence of fugitation had been passed at a former diet of Court—the cautioner allowed a proof, that the party was not legally summoned. James Laird, July 18, 1838, p. 178.

CONCEALMENT OF PREGNANCY.

1. The charge of art and part held to be properly omitted in an Indictment for concealment of pregnancy. Alison Punton, November 5, 1841, p. 572.

2. Held that it was not necessary, in a charge of concealment of pregnancy, to libel on the birth of 'a *full grown* child;' but that such a state of the fact, if averred in the Indictment, must be proved. *Ibid.*

CONFESSION.

1. One of two pannels having, previous to the Jury being impannelled, tendered a plea of guilty, which was put upon record, held, that the Public prosecutor had the option of either moving for sentence under that confession, or proving the case against both pannels. David Peter and John Smith, February 19, 1840, p. 492.

2. One of two pannels having, previous to the Jury being impannelled, tendered a plea of guilty, which was put upon record, but which the Public Prosecutor refused to accept,—question, whether it is competent to read this plea to the Jury as an adminicle of evidence. William Brash and Robert White, March 17, 1840, p. 500.

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1. A conviction of a substantive crime, such as murder or fire-raising, is incompetent under a charge of conspiracy, of which an act of that nature is stated to have been one of the means. Thomas Hunter and others, January 3, 1838, p. 1.
2. In a case of conspiracy, a letter, evidently relating to the business of the conspiracy, addressed to one of the pannels, and found in his house three or four days after his apprehension, although there is not sufficient proof that it was written by a co-conspirator, is an admissible article of evidence, *Ibid.*

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1. An objection to the relevancy of an Indictment for Culpable Homicide repelled. John Jones and Edward Malone, June 22, 1840, p. 509.
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3. A workman employed in the management of a diving bell, by whose alleged neglect of duty two lives were lost, indicted for Culpable Homicide; and an objection to the relevancy of the Indictment, to the effect that the presence of the pannel, at the time the deceased entered the bell, was not sufficiently set forth, repelled. Robert Young, May 20, 1839, p. 376.
4. A schoolmaster convicted of the Culpable Homicide of one of his pupils, by striking him with his fist, seizing him by the hair of the head, and throwing him with violence against a form, by which treatment his spine was fatally injured. Sentence, eighteen months imprisonment. David Patterson, July 17, 1838, p. 175.
5. A pannel charged with Murder, convicted of Culpable Homicide. Peter Cameron, Inverness, April 15, 1841, p. 543.
6. A pannel having assaulted a person, who was immediately conveyed to an hospital, where he contracted erysipelas, and died, acquitted of Culpable Homicide, and convicted only of the alternative charge of assault. James Wilson, Glasgow, January 10, 1838, p. 16.

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1. An objection to the declaration of a pannel, that it bore to be ' written on this and the six preceding pages,' whereas it consisted but of six pages in all, repelled. Robert Fulton, jun. Ayr, September 20, 1841, p. 564.
2. The declaration of a pannel born deaf and dumb sustained. David Smith, Perth, April 28, 1841 p. 517.
3. The declaration of a pannel who had deponed in Gaelic, found not to be sufficiently proved by the evidence of two witnesses, one of whom did not understand that language. Roderick Mackenzie, Inverness, April 13, 1839, p. 345.
4. It is not necessary, in regard to a declaration signed by the examining magistrate, in consequence of the pannel's inability to write, that the Indictment should set forth that the signature was adhibited in presence of the pannel, though it would be of importance if it were proved not to have been so done. Margaret Plenderleith or Dewar, June 21, 1841, p. 558.
5. It is no objection to a declaration, that the pannel, when emitting it, was, besides being informed that he was not bound to answer the questions put to him, told him that he ought to speak the truth and tell no lies. Robert Fulton, junior, Ayr, September 20, 1841, p. 564.

DEFENCE OF ALIBI.

It is not suffieient that a special defence, lodged as a foundation for a plea of *alibi*, state that the pannel was not, during a particular part of the day libelled, at or near the place libelled as the *locus delicti*, unless it states or refers to the places where he alleges that he actually was. Francis Gardiner and others, July 18, 1838, p. 180.

DEFORCEMENT.

1. In an Indictment for rescuing a deserter from a military party, the word ' deforcing' struck out on objection, as applicable only to the obstruction of a civil officer. George Mill and others, Jedburgh, September 6, 1839, p. 444.
2. Two pannels having been charged with Deforcement, by obstructing the execution of a warrant of open doors, granted by a Sheriff, for the purpose of removing goods poinded under a Small Debt decree,—the relevancy of the Indictment objected to, on the ground that a Sheriff has no power to grant such a warrant, and the case certified to the High Court. Alexander M'Lean and Malcolm M'Gillivray, Inverness, September 25, 1838, p. 185.

DISCHARGING LOADED FIRE ARMS.

(1.) A landed proprietor convicted at common law, of wounding two persons whom he found poaching on his land, by discharging both barrels of his fowling-piece at them. Sentence, eight

DISCHARGING LOADED FIRE ARMS—*Continued.*

months imprisonment. (2.) The Indictment being laid both at common law, and under the statute 10th Geo. IV. c. 38, a verdict finding the pannel guilty as libelled, 'but not with the intention of doing any serious bodily harm,' held to be a good conviction of the offence, at common law, but no judgment moved for on the statutory charge. Donald Kennedy, December 3, 1838, p. 213.

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A pannel convicted of contravention of the statute 1587, c. 27, by intruding himself without a token at the communion table, and refusing to remove when desired to do so, both by the officiating clergyman, and by a Justice of the Peace. Sentence, escheat of moveables. Hugh Fraser, Inverness, September 19, 1839, p. 436.

EMBEZZLEMENT.

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EMBEZZLING A MONEY LETTER.

A post office clerk, who pleaded guilty to contravention of the act 1st Victoria, c. 36, by embezzling and secreting a letter containing a five pound note, sentenced to seven years transportation. George Gunn Munro, March 12, 1840, p. 498.

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See AGGRAVATION, 2. ART AND PART, 2. CONFESSION, 2. DECLARATION. FORGERY, 5. HABITE AND REPUTE. INSANITY, 1. PRODUCTION. THREATENING LETTER. UTTERING BASE COIN, 7. WITNESS.

1. It is incompetent to prove the judgment of a kirk-session by parole evidence. Hugh Fraser, Inverness, September 19, 1839, p. 436.
2. An extract from the records of a kirk-session found inadmissible as evidence, in respect it was not signed on every page. Hugh Fraser, Inverness, Sept. 19, 1839, p. 436.
3. An extract from the records of a kirk-session, written on one sheet, and authenticated by the subscription of the clerk on the last page, found to be admissible in evidence. Alison Punton, Nov. 5, 1841, p. 572.
4. Parole evidence admitted, as to an oath taken by the pannel, as a witness in a Small Debt Court, three years previous to the trial, for the purpose of supporting a charge of Perjury in regard to a deposition subsequently emitted by him. Thomas Bauchop, July 6, 1840, p. 513.
5. A pannel having been acquitted on a charge of Theft, and being accused of having, on that occasion, suborned witnesses to commit perjury, it is competent, in his subsequent trial for the subornation, to prove that what the witnesses swore was false, even by evidence which establishes also the pannel's guilt of the theft,

EVIDENCE—*Continued.*

although that matter is properly *res judicata*. Robert Walker, March 19, 1838, p. 69.

6. An objection to medical evidence, in respect the animal substance to which it referred had not been preserved and produced, repelled. Alison Punton, Nov. 5, 1841, p. 572.
7. Circumstances in which the Prosecutor was allowed to libel on as a production, and to read to the Jury a judgment by a Lord Ordinary in the Court of Session, in a case in which the pannel was a party, although that judgment commented on certain documents on which the pannel intended to found. Alexander Humphreys or Alexander, April 29, 1839, p. 356.
8. Question as to the competency of producing an extract from a foreign register, without evidence as to the accuracy of the record from which it is taken, and as to the faith which it would have in a foreign court. Alexander Humphreys or Alexander, April 29, 1839, p. 356.
9. In a case of Conspiracy, a letter evidently relating to the business of the conspiracy, addressed to one of the pannels, and found in his house three or four days after his apprehension, although there is not sufficient proof that it was written by a co-conspirator, is an admissible article of evidence. Thomas Hunter and others, January 3, 1838, p. 1.
10. The hand writing of a party, deceased more than a hundred years ago, allowed to be proved, for the purpose of allowing an attestation, to which his signature was attached, to be read to the Jury; but held, that this attestation could not be read, to the effect of proving the truth of any fact therein set forth. Alexander Humphreys or Alexander, April 29, 1839, p. 356.
11. Held incompetent to produce in evidence letters written by a party who was proved to be alive, although the hand-writing was proved by a witness, and the post-marks were admitted. Alexander Humphreys or Alexander, April 29, 1839, p. 356.
12. Circumstances in which the Court doubted the competency of examining a witness, as to what he had been told by a person proved to be alive, regarding the proceedings of an illegal association, of which that person was a member, and the Prosecutor, in consequence, declined to press the question. Thomas Hunter and others, January 3, 1838, p. 1.
13. Two witnesses examined without objection, as to the account which they had received of the transaction, which was the subject of trial, from a person since deceased—not the party injured by the crime. Thomas Hunter and others, January 3, 1838, p. 1.
14. The declaration of a party since deceased, taken by way of precognition, by a person not a magistrate, without witnesses, and when the party was not in apprehension of death, found not

to be an admissible article of evidence, although it had been subsequently read over to the declarant, and attested by her in presence of a magistrate. Murdoch M'Kenzie M'Intosh, Perth, April 26, 1838, p. 103.

15. The evidence of the Procurator-fiscal held admissible, for the purpose of proving what a deceased witness said on precognition; but he having stated that he had recently read the precognition, and that he could not accurately distinguish between his recollection of what the witness said, and of what was contained in her written deposition, his evidence rejected. Alexander Stephens, Aberdeen, April 20, 1839, p. 348.

16. The evidence of the clerk by whom the precognition of a deceased witness was taken down, admitted, to prove what the witness said on that occasion. Alexander Stephens, Aberdeen, April 20, 1839, p. 348.

17. (1.) It is incompetent to contradict the evidence of the injured party as to the transaction which is the subject of trial, by proving, on his cross-examination, that he had given a different account of it three days afterwards. (2.) The party injured having denied, on cross-examination, that he told a particular witness, some time after the injury, that he kept the house, in order to give him a better claim of damages against the pannel,—held, that it was incompetent to contradict this statement, by the evidence of the witness referred to. Donald Kennedy, Dec. 3, 1838, p. 213.

18. Circumstances in which proof was allowed on the part of the pannel, that a witness had, when not on oath, made a statement different from that to which he swore in the witness box. Alexander Stephens, Aberdeen, April 20, 1839, p. 348.

19. Held incompetent for the counsel for the pannel to contradict the evidence of a witness, by reading to the Jury a deposition made by him as a witness in a civil process, although the process, and consequently the deposition, were included in the productions libelled on. James Stevens, March 15, 1839, p. 342.

20. A party on whom an Assault was charged to have been committed, having denied on his examination, that he received any injury from the pannel,—held competent to examine a subsequent witness, in regard to a charge made by that party against him *de recenti*, not with a view of contradicting the evidence of the first witness, but as relative to a direct accusation of guilt, made in the pannel's presence, and to himself. David Alexander, Ayr, April 27, 1838, p. 110.

21. It is competent in a trial for murder, though no previous malice is libelled, to lead evidence regarding the particulars of a quarrel between the parties a week previous to the commission of the crime. Arthur and Henrietta Woods, February 25, 1839, p. 323.

EVIDENCE—*Continued.*

22. It is competent, on a trial for uttering base coin, to lead evidence of previous unsuccessful attempts to utter, without any narrative of such attempts being set forth in the Indictment. James Ritchie and Andrew Morren, Nov. 29, 1841, p. 581.
23. The evidence of three engravers, that, in their opinion, a letter is in the same hand-writing as the signature to the pannel's declarations, and another writing which he acknowledged to be his, is not sufficient proof that the letter was written by him. Thomas Hunter and others, January 3, 1838, p. 1.
24. On a trial for uttering base coin, one of the coins alleged to be bad, which was admitted to have been in the hands of the Public Prosecutor, and had been libelled on as a production, not being produced to the Jury,—held, that the best evidence of the baseness of that coin had not been brought, and the charge of uttering it accordingly found not proven. Grace M'Ginnes and Isabella Johnston, July 16, 1839, p. 435.
25. A pannel convicted of uttering base coin, although the fact of the coin being bad was proved only by the evidence of a witness; and the coin itself, which was admitted to have been in the hands of the Public Prosecutor, and was libelled on as a production, was not shown to the Jury. Janet Laird, Glasgow, May 5, 1840, p. 503.
26. Question, whether it is competent, in support of a plea of insanity,—(1.) to prove that a relation of the pannel was insane,—(2.) to ask a medical witness who had heard the evidence, what was the opinion which he had formed from thence, as to the pannel's state of mind. Malcolm M'Leod, Inverness, April 14, 1838, p. 88.
27. It is incompetent to examine a medical witness, who has been in Court during the previous part of the trial, in regard to facts connected with the case wholly apart from his medical opinion. Elizabeth Jeffrey, Glasgow, April 30, 1838, p. 113.

EXCULPATORY EVIDENCE.

1. Evidence by the pannel's mother, of the account which her daughter had given her, *de recenti*, of her having found the money, of the theft of which she was accused, allowed to be given in exculpation. Jane Pye, Perth, October 3, 1838, p. 187.
2. The obtaining a certain certificate having been founded on as a ground of suspicion against one pannel, and the fact of having granted it against four others—the statement made by the party on applying for such certificate, held a part of the *res gesta*, and allowed to be proved in exculpation. Thomas Hunter and others, January 3, 1838, p. 1.

3. It is competent for the pannel, in a case of assault, to lead evidence of the passionate disposition of the party assaulted, having

EXCULPATORY EVIDENCE—*Continued.*

given notice in his defences of his intention to do so; but he cannot prove specific acts of violence committed by him. James Irving, Dumfries, April 23, 1838, p. 109.

4. A pannel charged with rape, or assault with intent to ravish, having averred, that the woman on whose person the offence was said to have been committed, had *de recenti* afterwards been found in bed with another man,—proof of this averment allowed, as bearing on the quality of the assault, and the extent of the injury said to have been inflicted; but evidence of her alleged immoral character, subsequent to that time, found incompetent. Hugh Leitch, Inverary, April 23, 1838, p. 112.

EXTORTION AND OPPRESSION.

A superintendant of police who pleaded guilty to six charges of extorting money from individuals, by instituting or threatening prosecutions against them under the act 17th Geo. III. c. 56, and afterwards privately abandoning the proceedings, sentenced to nine months imprisonment. George Jeffrey, January 22, 1840, p. 479.

FALSEHOOD, FRAUD, AND WILFUL IMPOSITION.

1. The obtaining credit for a pair of shoes, under the false representations by the pannel that he was a workman in the Lochrin distillery, and entitled to a pension as a discharged soldier, found to constitute a relevant charge of falsehood, fraud, and wilful imposition. Robert Meldrum and Catharine Reid, May 8, 1838, p. 117.
2. Two pannels, who pleaded guilty to a charge of falsehood, fraud, and wilful imposition, committed by uttering as genuine certain papers in imitation of bank notes, sentenced, the one to transportation for seven years, and the other to twelve months imprisonment in Bridewell. Alexander Lindsay and Robert Struthers, Nov. 19, 1838, p. 198.
3. (1.) A pannel who, having ordered goods from various tradesmen, on the assurance of payment on delivery, afterwards obtained possession of them by falsely representing himself as obliged suddenly to leave town in the course of his employment as a workman, and promising, if the goods were delivered at his house, to pay for them on the following lawful day, which promise he never performed, and thus imposed upon the tradesmen, and cheated them out of their property, found to be relevantly charged with falsehood, fraud, and wilful imposition. (2.) Observed, that the assumption of a false character is not necessary to the constitution of this crime. James Smith, Aberdeen, April 18, 1839, p. 346.
4. Two pannels having ordered goods from shopkeepers, under an agreement or understanding that they would pay for them on delivery, and having afterwards obtained possession of the goods

FALSEHOOD, FRAUD, &c.—*Continued.*

by falsely pretending that they would pay for them at a specified time, found to be relevantly charged with falsehood, fraud, and wilful imposition. James and Robert Mackintosh, June 29, 1840, p. 511.

5. In an Indictment for the above crime, the minor proposition of which contains a general narrative, followed by several specific charges, it is not necessary that the introductory narrative should be such as to constitute by itself a relevant charge. Patrick Thomas Caulfield, Perth, October 1, 1840, p. 522.

FALSEHOOD AND FRAUD.

Minutes of Debate ordered on the relevancy of an Indictment for Breach of Trust and Embezzlement, as also Falsehood and Fraud; but the pannels subsequently tried and acquitted on a new Indictment. John and James Christie, March 12, 1841, p. 534.

FINDING LOST PROPERTY.

1. The appropriation, by a pannel, of articles found on the highway, the owner of which is well known to him, is Theft. John Smith, March 12, 1838, p. 28.
2. A pannel convicted of Theft, by appropriating to her own use money which had dropped from the pocket of a person in her company, well knowing to whom it belonged. Jane Pye, Perth, October 3, 1838, p. 187.
3. A party having been sentenced by a Police Court to twenty days imprisonment, for having found a purse containing money, at a certain place, "shortly after it had been lost," and when "afterwards" asked to return it, having denied having found it, and appropriated the money to her own use, a bill of Suspension brought on the grounds, (1.) that the offence charged is not a matter of criminal dittay, (2.) that there was no specification of the time when, or the place where it was committed—refused. Whitton *v.* Drummond, March 12, 1838, p. 62.

FIRE-RAISING.

A doubt expressed by the Court, whether the burning of a door, merely for the purpose of getting through, could be relevantly charged as the capital crime of Fire-raising. Jean Gordon or Bryan and others, Aberdeen, April 22, 1841, p. 545.

FOREIGN.

1. Question as to the competency of producing an extract from a foreign register, without evidence as to the accuracy of the record from which it is taken, and as to the faith which it would have in a foreign court. Alexander Humphreys or Alexander, April 29, 1839, p. 356.
2. It is no objection to the admissibility of a foreign witness, that, in order to induce him to come to this country to give evidence, he has received, besides his expenses, a sum considerably greater than what he could have derived at home from the profits of

FOREIGN—*Continued.*

his trade. Alexander Humphreys or Alexander, April 29, 1839, p. 356.

FORGERY.

1. A pannel who had adhibited to a bill of exchange, the subscriptions, by mark, of two parties as acceptors, found to be relevantly charged with Forgery. Duncan Cattanach, May 27, 1840, p. 505.
2. A pannel having pleaded guilty to a charge of forging the name of another as co-acceptor along with himself to a bill of exchange, prepared by the clerk of a road trust, in order to constitute a cautionary obligation for payment of the rent offered by the pannel for a toll-bar; held, that the crime was one which, previous to the passing of the act 2d and 3d William IV. c. 123, would have been capital, and the punishment of which was, therefore, now regulated by the act 1st Victoria, c. 84. Alexander Whitelaw, Jedburgh, April 17, 1839, p. 351.
3. A messenger-at-arms, who pleaded guilty to three acts of forging the names of individuals as witnesses to executions, sentenced to six months imprisonment. William Brown, Dec. 4, 1839, p. 478.
4. A pannel convicted of forging a certificate of poverty, and delivering it to a party for the purpose of obtaining charity, aggravated by a previous conviction,—sentenced to ten years transportation. Walter Hamilton Smith, Dec. 7, 1840, p. 525.
5. (1.) In a trial for Forgery, a chemical experiment permitted to be made on a part of one of the documents alleged to be forged, with a view of ascertaining whether the colour of the paper was the effect of age or was produced by artificial means—this experiment not being such as could injure the body of the document. (2.) Question, whether such an experiment should be conducted jointly by two scientific witnesses, or by each separately. Alexander Humphreys or Alexander, April 29, 1839, p. 356.
6. In a charge of forging the signatures to a bond of caution, it is no objection to the admissibility of a witness, that he was the professional agent employed by the pannel in procuring the bond. Hector M'Lean, Inverness, Sept. 24, 1838, p. 183.
7. Opinion expressed from the bench that certain cases of Forgery may be tried before the Sheriff and a Jury. *Note on p. 447.*

HABITE AND REPUTE.

1. This aggravation is sufficiently established, by proof of the existence of the evil repute in which the pannel has been held, for the requisite period; and it is not necessary for the Prosecutor to show that that repute is founded on sufficient grounds. Margaret M'Kenzie, Nov. 26, 1838, p. 210.
2. The aggravation of being habite and repute a thief is not esta-

HABITE AND REPUTE—*Continued.*

blished, unless the pannel is proved to have borne that character for twelve months next previous to the date of trial. William Brash and Robert White, March 17, 1840, p. 500.

3. A pannel having been fugitated in April 1832, on a charge of theft committed in December 1831, and proved to have been habite and repute a thief for two years previous to the latter date, but no evidence being led as to his character from that time till April 1837, when he was again apprehended,—held that the aggravation could not be found proven, on the ground that the statement of it applied to the date of trial, not to the time when the offence was committed. Robert Heron, Perth, April 27, 1838, p. 104.
4. The aggravation of being habite and repute a thief found proven against a pannel tried in April for a theft committed in October preceding, on the evidence of police officers that he had borne that character for eighteen months or two years, although he had been in jail ever since the commission of the crime, and it was proved in exculpation that within nine months before he committed it he had worked regularly at his trade. James Wilson and John Madden, Dumfries, April 23, 1838, p. 107.
5. The aggravation of being habite and repute a thief found proven against a pannel who had been twice convicted during the three preceding years, although the evidence of one out of the two witnesses to the aggravation extended no further back than two years, during fifteen months of which the pannel had been in jail under the last conviction. James Pringle and Helen Scott, Jedburgh, Sept. 11, 1838, p. 192.

HOUSE-BREAKING.

1. A charge of house-breaking by raising the sash of a window, abandoned on the suggestion of the Court, after proof that the window in question was frequently used as an ordinary mode of entry. James Davidson, Glasgow, Dec. 21, 1841, p. 630.
2. In a case of house-breaking, charged to have been committed '*by forcing open the outer door of the said house*, or otherwise to the Prosecutor unknown,' the statement of the *modus operandi* is sufficiently specific. Wilhelmina Macdonald Fraser, Dumfries, April 27, 1840, p. 502.
3. A substantive aggravation, such as house-breaking, may be proved by the evidence of a single witness. Richard Cameron, Nov. 7, 1839, p. 447. The law was once held to be different. John Davidson, Perth, April 24, 1838, p. 102.

HOUSE-BREAKING WITH INTENT TO STEAL.

A pannel charged with the above crime acquitted, in respect that the evidence negatived the entry of the premises. Robert Campbell, Nov. 29, 1841, p. 580.

HUSBAND AND WIFE.

Two pannels charged with Theft, in respect of their having, in concert together, carried off goods described as the property of the husband of one of them—an objection taken to the relevancy of the charge—and the case certified to the High Court. Donald M'Leod and Wedderburn Dick or Smith, Perth, Oct. 4, 1838, p. 190.

INDICTMENT.

See AGGRAVATION, 1. CONCEALMENT OF PREGNANCY. CONSPIRACY, 1. CULPABLE HOMICIDE, 1, 2, 3. DECLARATION, 1, 4. DEFORCEMENT. FALSEHOOD, FRAUD, AND WILFUL IMPOSITION, 1, 3, 4, 5. FALSEHOOD AND FRAUD. HOUSEBREAKING, 2. LOCUS DELICTI. MURDER, 2, 3. PERJURY.

1. The charge of art and part held to be properly omitted in an Indictment for concealment of pregnancy. Alison Punton, Nov. 5, 1841, p. 572.
2. An objection to an Indictment containing several major propositions, that each minor could not be specially referred to one of the majors, which at once reached and covered it, repelled. Thomas Hunter and others, Jan 3, 1838, p. 1.
3. Certain words struck out of that part of an Indictment for perjury which professed to give a true statement of the facts of the case, in respect they did not traverse the deposition by the pannel libelled as false. Thomas Bauchop, July 6, 1840, p. 513.
4. In an Indictment for falsehood, fraud, and wilful imposition, the minor proposition of which contains a general narrative, followed by several specific charges, it is not necessary that the introductory narrative should be such as to constitute by itself a relevant charge. Patrick Thomas Caulfield, Perth, October 1, 1840, p. 522.
5. An act of murder having been charged cumulatively, as committed by one of five pannels under the instigation and direction of the rest: AS ALSO, by the whole five directly—the first statement held to be a relevant charge of murder against all the pannels, and the second departed from as inconsistent with it. Thomas Hunter and others, January 3, 1838, p. 1.
6. A statement, subjoined to a charge of theft, that the pannel was only prevented from committing farther depredations by being detected in the act of stealing, struck out of the Indictment. Mary Lorimer, Aberdeen, April 19, 1838, p. 100.
7. Objection of undue latitude in setting forth the mode of death repelled. Peter Cameron, Inverness, April 15, 1841, p. 543.
8. An objection to an Indictment for subornation of perjury, that too great latitude was assumed in stating the time and place at which the offence was committed, and the means of inducement held out, repelled. Robert Walker, March 19, 1838, p. 69.
9. A charge of assault on a child of tender years, allowed to be

INDICTMENT—*Continued.*

stated as having been committed 'at many different times,' during a space of nearly ten months, 'the particular times being to the prosecutor unknown.' John and Mary Craw, Nov. 8, 1839, p. 449.

10. A latitude of more than seven months allowed to be taken, in stating the time during which various acts of theft were committed, in respect the crime was charged to have been done with the co-operation of, and in concert with the son of the party from whom the goods were stolen. William Cattanach, Perth, October 4, 1838, p. 189.

11. In a charge of rape, or assault with intent to ravish, a latitude of three months allowed to be taken in stating the time of the offence—the female assaulted being under the years of puberty. William Carlyle, June 10, 1839, p. 392.

12. A charge of assault and robbery, stated to have been committed 'in or near to' a certain street, abandoned by the public prosecutor, with the concurrence of the Court, on the ground that the crime was proved to have been committed at a spot three hundred yards distant from the street libelled, and in a street which, though in continuation of it, was known by a different name. Peter Rice, Perth, October 5, 1838, p. 191.

13. An error in the trade of the injured party is of no consequence, if he is otherwise sufficiently and correctly described. James Noble, July 12, 1838, p. 163.

14. An error in the description of the *locus delicti* found fatal, though it existed also in the pannel's designation, as contained in the Indictment to which he had pleaded, and as set forth in his declaration. Archibald M'Quilkin, November 26, 1838, p. 212.

15. Held competent to strike certain letters out of an Indictment, for the purpose of correcting an error in the designation of some of the witnesses. Daniel Mackenzie and others, Glasgow, May 4, 1839, p. 354.

INSANITY.

1. A pannel unanimously convicted of the murder of his wife—his defence of insanity at the time when the offence was committed, being held by the Court and Jury to have failed. Malcolm M'Leod, Inverness, April 14, 1838, p. 88.

2. Question, whether it is competent, in support of a plea of insanity,—(1.) to prove that a relation of the pannel was insane,—(2.) to ask a medical witness who had heard the evidence, what was the opinion which he had formed from thence, as to the pannel's state of mind. Malcolm M'Leod, Inverness, April 14, 1838, p. 88.

JUSTICE OF PEACE COURTS.

(1.) The forms of service and execution, prescribed by the statute

JUSTICE OF PEACE COURTS—*Continued.*

9th Geo. IV. c. 29, do not apply to Justice of Peace Courts. (2.) The same accuracy is not required in complaints before the Justices as in Indictments before the Justiciary Court. M'Cartney *v.* Guthrie, January 19, 1838, p. 23.

KEEPING A GAMING-HOUSE.

1. An Indictment under the statutes 12th Geo. II. c. 28, and 18th Geo. II. c. 34, against four pannels, who had set up a gaming-house in Edinburgh, found incompetent, on the ground that the statutes do not extend to Scotland. Bernard Greenhuff and others, May 21, 1838, p. 128.
2. (1.) The opening and keeping of a common gaming house, for the playing of games of chance for money, for the profit of the keepers, and where games of chance are commonly and publicly played for money, found an indictable offence at common law. (2.) A pannel who pleaded guilty to a charge of opening and keeping a gaming-house of the above description in Edinburgh, sentenced to two months imprisonment. Bernard Greenhuff and others, December 19, 1838, p. 236.

LOCUS DELICTI.

1. Reasons of suspension, founded, *inter alia*, on the want of any sufficient specification of the *locus delicti* in the original complaint, repelled. Crawford *v.* Wilson and Jamesons, Nov. 19, 1838, p. 200.
2. A charge of assault and robbery stated to have been committed 'in or near to' a certain street, abandoned by the Public Prosecutor, with the concurrence of the Court, on the ground that the crime was proved to have been committed at a spot three hundred yards distant from the street libelled, and in a street, which, though in continuation of it, was known by a different name. Peter Rice, Perth, Oct. 5, 1838, p. 191.
3. An error in the description of the *locus delicti* found fatal, though it existed also in the pannel's designation, as contained in the Indictment to which he had pleaded, and as set forth in his declaration. Archibald M'Quilkin, Nov. 26, 1838, p. 212.
4. A charge of culpable homicide given up, and the pannels acquitted, in consequence of an erroneous statement of the *locus delicti*. John Jones and Edward Malone, June 22, 1840, p. 509.
5. A libel, charging a pannel with an aggravated assault, found not proven, in consequence of an erroneous statement of the occupation of the house set forth as the *locus delicti*. John Mackenzie, Nov. 23, 1840, p. 524.
6. An objection founded on an alleged insufficient specification of the *locus delicti* in a charge of murder, repelled. Thomas Crosbie, May 17, 1841, p. 550.
7. Question, whether a plan of the *locus delicti* libelled on, can be

LOCUS DELICTI—*Continued.*

competently proved by the evidence of the Procurator-fiscal, as a party identified with the prosecution. Opinion expressed by the Court, that the proper mode of proving such a plan is by the evidence of the surveyor by whom it is prepared. Joseph and Maxwell Allison, July 16, 1838, p. 167.

MALVERSATION IN OFFICE.

An Indictment for malversation in office, and breach of public trust objected to, and that charge abandoned. Alexander Findlater and James M'Dougall, Glasgow, Jan. 9, 1841, p. 527.

MASTER AND APPRENTICE.

See STATUTE 4TH GEO. IV. c. 34.

MEDICAL EVIDENCE.

1. Question, whether it is competent, in support of a plea of insanity,—(1.) to prove that a relation of the pannel was insane,—(2.) to ask a medical witness who had heard the evidence, what was the opinion which he had formed from thence, as to the pannel's state of mind. Malcolm M'Leod, Inverness, April 14, 1838, p. 88.
2. An objection to medical evidence, in respect the animal substance to which it referred had not been preserved and produced, repelled. Alison Punton, Nov. 5, 1841, p. 572.

MEDICAL WITNESS.

It is incompetent to examine a medical witness, who has been in Court during the previous part of the trial, in regard to facts connected with the case, wholly apart from his medical opinion. Elizabeth Jeffray, Glasgow, April 30, 1838, p. 113.

MURDER.

1. A conviction of a substantive crime, such as murder or fire-raising, is incompetent under a charge of conspiracy, of which an act of that nature is stated to have been one of the means. Thomas Hunter and others, January 3, 1838, p. 1.
2. An act of murder having been charged cumulatively, as committed by one of five pannels under the instigation and direction of the rest, AS ALSO by the whole five directly,—the first statement held to be a relevant charge of murder against all the pannels, and the second departed from as inconsistent with it. Thomas Hunter and others, January 3, 1838, p. 1.
3. Objection of undue latitude, in setting forth the mode of death in a charge of murder, repelled. Peter Cameron, Inverness, April 15, 1841, p. 543.
4. (1.) An objection founded on an alleged insufficient specification of the *locus delicti*, in a charge of murder, repelled. (2.) A pannel tried for the murder of a child of three days old, whose body had never been found; but the libel found not proven. Thomas Crosbie, May 17, 1841, p. 550.
5. Circumstances in which, on a trial of two brothers, for stabbing

MURDER.—*Continued.*

to the heart, with a bayonet, a person from whom they had received no injury, and against whom they could therefore bear no previous malice, one of the pannels was acquitted, and the other convicted of murder, partly on the ground, that there was a considerable interval between the perpetration of the crime, and the provocation which was said to have led to it. Joseph and Maxwell Allison, July 16, 1838, p. 167.

6. Circumstances in which, on the trial of a man and his wife for the murder of the husband's son, by a former marriage, the male pannel was convicted, and the libel against the female found not proven. Arthur and Henrietta Woods, February, 25, 1839. p. 323.
7. A pannel unanimously convicted of the murder of his wife,—his defence of insanity, at the time when the offence was committed, being held by the Court and Jury to have failed. Malcolm M'Leod, Inverness, April 14, 1838, p. 88.
8. A pannel convicted, on circumstantial evidence, of a double murder. Elizabeth Jeffray, Glasgow, April 30, 1838, p. 113.
9. A pannel charged with Murder, convicted of Culpable Homicide. Peter Cameron, Inverness, April 15, 1841, p. 543.
10. It is competent in a trial for murder, though no previous malice is libelled, to lead evidence regarding the particulars of a quarrel between the parties a week previous to the commission of the crime. Arthur and Henrietta Woods, February 25, 1839, p. 323.

MOBBING AND RIOTING.

1. An Indictment for mobbing and rioting found irrelevant, in respect that no common purpose was set forth. Francis Docherty and others, Glasgow, December 23, 1841, p. 635.
2. An objection to an Indictment for rioting and breach of the peace, that the *species facti* libelled amounted to the crime of mobbing, repelled. John M'Cabe and others, Glasgow, January 12, 1838, p. 20.

NEGLIGENT MANAGEMENT OF MACHINERY.

Question, whether culpable and negligent management of machinery, "whereby the safety of the lieges is put in danger," without any *result* being set forth, is an indictable offence. Robert Young, May 20, 1839, p. 376.

OBJECTION IN ARREST OF JUDGMENT.

An objection founded on a contradiction in the terms of the verdict, sustained in arrest of judgment on one of the charges,—it being held that no explanation of the verdict was competent, after it had been recorded, and the Jury formally discharged. Thomas Hunter and others, January 3, 1838, p. 1.

OPENING LOCKFAST PLACES.

1. A substantive aggravation, such as opening lockfast places, may be proved by the evidence of a single witness. James Davidson, Glasgow, Dec. 21, 1841, p. 630.—The law on this point was once held to be different. Elizabeth Conner and Susan Dougharty, Glasgow, September 20, 1838, p. 194.
2. Opinion indicated, that 'opening lockfast places with intent to 'steal' is a relevant article of dittay. Case of Allan Lawrie, July 14, 1837, referred to in note on p. 101.

OUTLAW.

An outlaw is inadmissible as a witness, and the Court will not, without a previous application, repone him against the sentence of outlawry, in order to make his evidence competent. Duncan Hunter, Inverness, September 24, 1838, p. 181.

PARENT AND CHILD.

1. Two pannels convicted of 'the cruel and unnatural treatment and wilful and culpable neglect of an Infant by its parents or natural and legal custodiers, whereby such infant is injured in its person and health,' and sentenced to twelve months imprisonment. John and Mary Craw, November 8, 1839, p. 449.
2. Two pannels, who pleaded guilty to a charge of 'cruel and unnatural treatment, and wilful and culpable neglect of a child of tender years by its parent or custodier, whereby such child is injured in person and health,' sentenced to four months imprisonment. David and Janet Gemmell, June 5, 1841, p. 552.
3. (1.) A father adduced to prove an assault on him by his own child has not an option to decline giving evidence. (2.) A mother examined as an exculpatory witness in the trial of her daughter, after having been informed of her option to decline giving evidence in the case. Agnes Blair or Munro, March 12, 1840, p. 496.
4. A boy between ten and eleven years of age, found inadmissible as a witness against his father, even in a trial for an injury inflicted on his mother. Jacob Campbell, November 7, 1838, p. 196.
5. A girl under the years of pupillarity found, under the provisions of the statute 3d and 4th Victoria, c. 59, to be an admissible witness against her father. Mary Ann Cairns and others. Feb. 15, 1841, p. 531.

PERJURY.

1. The taking falsely the oath prescribed by the Reform Act, (Schedule I.) held not to be perjury; but found, nevertheless, to be an indictable offence at common law. John Barr, January 23, 1839, p. 282.
2. (1.) Certain words struck out of that part of an Indictment for Perjury which professed to give a true statement of the facts of

PERJURY—*Continued.*

the case, in respect they did not traverse the deposition by the pannel libelled as false.

(2.) Parole evidence admitted, as to an oath taken by the pannel, as a witness in a Small Debt Court, three years previous to the trial, for the purpose of supporting a charge of perjury in regard to a deposition subsequently emitted by him. Thomas Bauchop, July 6, 1840, p. 513.

PETITION AND COMPLAINT.

The cashier of a country bank, who, after being cited to appear as a witness before the Sheriff-substitute of the county, and produce a bill suspected to be forged, gave up the bill to a third party, on payment of its contents, found guilty, on a petition and complaint at the instance of the Lord Advocate, of illegally obstructing the administration of justice, and fined in the sum of L.100. The Lord Advocate *v.* Alexander Galloway, December 4, 1839, p. 465.

POSSESSION OF BASE COIN.

Two pannels being charged with contravention of the Statute 2 William IV. c. 34. § 8, and the base coin having been proved to have been in the possession of one only, question whether the other pannel could be convicted, as guilty, art and part, of the offence libelled. Isabella Murray and Helen Carmichael or Bremner, July 26, 1841, p. 559.

POST OFFICE.

A post office clerk, who pleaded guilty of contravention of the statute 1st Victoria, c. 36, by embezzling and secreting a letter containing a five pound note, sentenced to seven years transportation. George Gunn Munro, March 12, 1840, p. 498.

PRECOGNITION.

1. The evidence of the clerk by whom the precognition of a deceased witness was taken down, admitted, to prove what the witness said on that occasion. Alexander Stephens, Aberdeen, April 20, p. 348.

2. The declaration of a party since deceased, taken by way of precognition, by a person not a magistrate, without witnesses, and when the party was not in apprehension of death, found not to be an admissible article of evidence, although it had been subsequently read over to the declarant, and attested by her in presence of a Magistrate. Murdoch M'Kenzie M'Intosh, Perth, April 26, 1838, p. 103.

PREVIOUS CONVICTION.

1. Question, whether a previous conviction, before a regimental court martial, can be competently founded on. James Murray, March 13, 1838, p. 68.

2. A pannel having been charged, both at common law, with the

PREVIOUS CONVICTION—*Continued.*

offence of uttering base coin, aggravated by previous convictions, and also with contravention of the statute 2 William IV. c. 34, § 7, held competent to libel a previous conviction of the high crime and offence created in the statute, as a common law aggravation of the principal charge. Mary White, November 5, 1841, p. 568.

PRISON-BREAKING.

An objection to the relevancy of an Indictment for prison-breaking, more especially when committed by means of setting fire to the doors or other part of a prison, repelled. Jean Gordon or Bryan and others, Aberdeen, April 22, 1841, p. 545.

PROCESS.

See ALIBI. ASSIZE, 1, 2. DECLARATION. FORGERY, 5. INDICTMENT. PETITION AND COMPLAINT.

1. Question, whether it is competent for the Public Prosecutor to contradict a certificate of good character produced by the pannel, in mitigation of punishment, by the evidence of witnesses not contained in any list served on the pannel. James Nimmo and James Forsyth, March 13, 1839, p. 338.
2. One of two pannels having, previous to the jury being impannelled, tendered a plea of guilty, which was put upon record, held, that the Public Prosecutor had the option of either moving for sentence under that confession, or proving the case against both pannels. David Peter and John Smith, February 19, 1840, p. 492.
3. One of two pannels having, previous to the jury being impannelled, tendered a plea of guilty, which was put upon record, but which the Public Prosecutor refused to accept,—question, whether it is competent to read this plea to the jury as an adminicle of evidence. William Brash and Robert White, March 17, 1840, p. 500.
4. A juryman having been taken ill after the close of the evidence for the prosecution, the jury discharged, and the pannel brought to trial the following day, before a new jury, ballotted from the same list of Assize. Jean Grant and others, July 12, 1838, p. 165.
5. Form of adjournment at the close of each day of a protracted trial. Thomas Hunter and others, January 3, 1838, p. 1; and Alexander Humphreys or Alexander, April 29, 1839, p. 356.
6. Circumstances in which a sentence of *absolvitor* was pronounced in absence of the pannel. Alexander Humphreys or Alexander, April 29, 1839, p. 356.
7. A pannel sentenced to eight days imprisonment, for contempt of Court by his conduct at the bar. Alexander M'Lean, Inverness, September 25, 1838, p. 185.

PROCESS—*Continued.*

8. A certificate of previous good character having been produced by a pannel in mitigation of punishment, which, from evidence before the Court, appeared to contain, if not a false statement, at least a suppression of the truth, the granter of the certificate ordered to attend at the bar, but dismissed, after an explanation which was considered satisfactory. James Nimmo and James Forsyth, March 13, 1839, p. 338.

9. An apprentice having been convicted of desertion, under the statute 4th Geo. IV. c. 34, and sentenced to one month's imprisonment, and he having absconded before this sentence was carried into effect, and having been apprehended two months afterwards, without a warrant, and carried before the Justice by whom the former sentence was pronounced—held, that it was competent for the Justice, without any petition being presented for the application of the former judgment, to find the apprentice guilty of deserting, and of not returning to his service, and resentence him anew to one month's imprisonment. Duthie *v.* Birnie, May 20, 1839, p. 385.

PROCURATOR FISCAL.

1. The evidence of the Procurator-fiscal held admissible, for the purpose of proving what a deceased witness said on precognition; but he having stated that he had recently read the precognition, and that he could not accurately distinguish between his recollection of what the witness said, and of what was contained in her written deposition, his evidence rejected, Alexander Stephens, Aberdeen, April 20, 1839, p. 348.

2. Question, whether a plan of the *locus delicti* libelled on, can be competently proved by the evidence of the Procurator-fiscal, as a party identified with the prosecution. Opinion expressed by the Court, that the proper mode of proving such a plan is by the evidence of the surveyor by whom it is prepared. Joseph and Maxwell Alison, July 16, 1838, p. 167.

PRODUCTION.

See EVIDENCE, 8, 9.

1. Question, whether part of the stolen articles libelled on as productions, but never lodged in the clerk's hands, can nevertheless be produced, in respect no enquiry had been made for them, on the part of the pannels, before the trial. James Pringle and Helen Scott, Jedburgh, September 11, 1838, p. 192.

2. (1.) Circumstances in which the Prosecutor was allowed to libel on as a production, and to read to the jury a judgment by a Lord Ordinary in the Court of Session, in a case in which the pannel was a party, although that judgment commented on certain documents on which the pannel intended to found. (2.) An objection, founded on the insufficient description of one of

PRODUCTION—*Continued.*

the productions libelled on, repelled. Alexander Humphreys or Alexander, April 29, 1839, p. 356.

3. The witnesses to the *corpus delicti* having deponed, that they pointed out the particular spots where certain occurrences took place, to a land surveyor, and the surveyor having sworn that these spots were correctly marked on a plan of the *locus* prepared by him, this plan allowed to be produced, although its effect was in some degree to contradict the evidence of the witnesses; but certain marginal references, containing matter which could not have been communicated by them, cut off, before the plan was handed to the jury. Donald Kennedy, December 3, 1838, p. 213.
4. Question, whether a plan of the *locus delicti* libelled on, can be competently proved by the evidence of the Procurator-fiscal, as a party identified with the prosecution. Opinion expressed by the Court, that the proper mode of proving such a plan is by the evidence of the surveyor by whom it is prepared. Joseph and Maxwell Alison, July 16, 1838, p. 167.
5. An objection to medical evidence, in respect the animal substance, to which it referred, had not been preserved and produced, repelled. Alison Punton, November 5, 1841, p. 572.

PROOF.

See CONFESSION. EVIDENCE. PRODUCTION. WITNESS.

RAPE.

1. A boy under the age of fourteen, convicted of the crime of rape, and sentenced to fifteen years transportation. Robert Fulton, jun., Ayr, September 20, 1841, p. 564.
2. Reference to authorities in the law of England, establishing that in that country, a boy under the age of fourteen is held incapable of committing a rape. *Note* on p. 565.
3. In a charge of Rape, or assault with intent to ravish, a latitude of three months allowed to be taken in stating the time of the offence,—the female assaulted being under the years of puberty. William Carlyle, June 10, 1839, p. 392.
4. A pannel charged with Rape, or assault with intent to ravish, having averred, that the woman on whose person the offence was said to have been committed, had *de recenti* afterwards been found in bed with another man,—proof of this averment allowed, as bearing on the quality of the assault, and the extent of the injury said to have been inflicted, but evidence of her alleged immoral character, subsequent to that time, found incompetent. Hugh Leitch, Inverary, April 23, 1838, p. 112.
5. Opinion indicated by the Court, that it is incompetent, under a charge of assault with intent to ravish, to prove that a rape was actually committed. William Byrne, Nov. 10, 1838, p. 197.

RECKLESS DRIVING.

An objection to a charge of culpable homicide, committed by means of reckless driving, repelled. William Messon, Perth, April 29, 1841, p. 548.

REFORM ACT.

The taking falsely the oath prescribed in the Reform Act, (Schedule I.) held not to be Perjury—but found, nevertheless, to be an indictable offence at common law. John Barr, January 23, 1839, p. 282.

RES JUDICATA.

A pannel having been acquitted on a charge of theft, and being accused of having, on that occasion, suborned witnesses to commit perjury, it is competent, on his subsequent trial for the subornation, to prove that what the witnesses swore was false, even by evidence which establishes also the pannel's guilt of the theft, although that matter is properly *res judicata*. Robert Walker, March 19, 1838, p. 69.

RIOTING AND BREACH OF THE PEACE.

An objection to an Indictment for rioting and breach of the peace, that the *species facti* libelled amounted to the crime of mobbing, repelled. John M'Cabe and others, Glasgow, January 12, 1838, p. 20.

ROBBERY.

1. A pannel having obtained possession of a watch by a sudden snatch, which broke the guard chain, and the party assaulted having at the same moment fallen, either from being tripped, or accidentally,—held that there was a sufficient amount of violence to constitute the crime of robbery. James Fegen, Jan. 29, 1838, p. 25.
2. Two pannels convicted of robbery, and discharging loaded fire-arms, sentenced to transportation for life. David Peter and John Smith, February 19, 1840, p. 492.
3. Four pannels convicted of assault and robbery, sentenced to imprisonment for two years and a half. Euphemia Muir and others, Glasgow, Dec. 23, 1841, p. 634.

SENTENCE.

Circumstances in which sentence of *absolvitor* was pronounced in absence of the pannel. Alexander Humphreys or Alexander, April 29, 1839, p. 356.

SHEEP-STEALING.

1. A pannel, who pleaded guilty to a charge of stealing two lambs, aggravated by having been previously convicted of theft, sentenced to twelve months imprisonment. Robert Stevenson, Nov. 13, 1841, p. 577.
2. Reference made to various recent unreported cases, in which

SHEEP-STEALING.—*Continued.*

sentences of imprisonment have been awarded in cases of sheep stealing. *Note* on p. 578.

SHERIFF.

Two pannels having been charged with deforcement, by obstructing the execution of a warrant of open doors, granted by a Sheriff, for the purpose of removing goods poinded under a Small Debt decree,—the relevancy of the Indictment objected to, on the ground that a Sheriff has no power to grant such a warrant, and the case certified to the High Court. Alexander M'Lean and Malcolm M'Gillivray, Inverness, Sept. 25, 1838, p. 185.

STATUTE.

—— 1587 c. 27. See DISTURBING DIVINE SERVICE.

—— 12TH GEO. II. c. 28, AND 18TH GEO. II. c. 34. See KEEPING A GAMING HOUSE.

—— 17TH GEO. III. c. 56.

See EXTORTION AND OPPRESSION.

1. (1.) It is no objection to a complaint, under the above statute, that although presented after the accession of Her present Majesty, it was addressed to *His* Majesty's Justices of the Peace, or that in the address the county was left blank. (2.) The essence of the crime constituted by the statute being the *possession* of articles of the nature there referred to—not the *concealment* of them, it is sufficient if the complaint bear that such articles are concealed, *or to be found*, in the house of the person complained against. (3.) The objections that a written proof was taken, and that the two Justices, before whom the accused was originally brought, did not act throughout the whole case, repelled. Mackenzie *v.* Jeffrey, June 11, 1838, p. 152.

2. (1.) An advocation and suspension of a judgment of the Justices of the peace, affirmed by the Quarter Sessions, under the above statute, found competent, though the judgment had been obtempered by payment of the penalty imposed. (2.) The judgment suspended, partly on the ground, that under the provision of the statute relative to any 'purloined or embezzled materials, whether mixed or unmixed, wrought or unwrought,' a completely finished article of manufacture is not included. Gillies *v.* Jeffrey, December 4, 1839, p. 454.

3. (1.) A suspension of a judgment under the above statute, is competent, although no appeal has been taken to the Quarter Sessions. (2.) A complaint having been presented to the Justices of Peace, and persisted in at

several diets of Court, regularly adjourned, and an adjournment having been made to a particular day, on which day the Court did not meet, the judgment pronounced on a subsequent day suspended, in respect the charge had been allowed to fall. Malonie *v.* Jeffrey, January 22, 1840, p. 485.

4. A judgment under the above statute suspended, in respect (1.) that the conviction contained no specification of any offence falling under the statute, and (2.) that the place of the alleged offence was not set forth in the conviction. M'Innerney *v.* Simpson, Dec. 6, 1841, p. 590.

5. A judgment under the above statute suspended, in respect the conviction contained no sufficient specification of any offence falling under the statute. Duff *v.* Simpson, Dec. 6, 1841, p. 615.

—— 4TH GEO. IV. c. 34.

1. (1.) The provisions of the statute 4th Geo. IV. c. 34, are applicable to the case of an apprentice under a regular indenture, with a cautioner, and a clause of registration. (2.) The judgment of the Justices is not liable to any review on the merits. Crawford *v.* Wilson and Jamesons, November 19, 1838, p. 200.

2. (1.) A judgment of the Justices of the Peace, under the above statute, is not subject to any review on the merits. (2.) Reasons of suspension founded *inter alia* on the vagueness of the complaint, repelled. Milloy *v.* Sneddon, May 20, 1839, p. 381.

3. A Bill of Suspension of a judgment under the above statute, on the grounds (1.) that the apprentice complained against was not proved to fall within the meaning of the acts therein recited, (2.) that the charge was not sufficiently specific, and (3.) that the evidence was not conclusive, refused. Duthie *v.* Birnie, May 20, 1839, p. 385.

4. A suspension of a judgment under the above statute, against an apprentice who had absconded, on the ground that the term of his Indenture had expired before the judgment was pronounced, refused. Macgregor *v.* Balfour and M'Callum, December 4, 1839, p. 451.

5. A suspension of a judgment, under the above statute, on the ground that the complaint contained vitiations and erasures, and that there was contained in the sentence an allocation of aliment, not authorised by the statute, or concluded for in the complaint, refused. Gerrond *v.* Goold, May 20, 1839, p. 390.

6. (1.) It is no ground for suspending a judgment under the statute 4th Geo. IV. c. 34, or any similar statute, that

STATUTE.—*Continued.*

the petition to the Justices in which the proceedings originated, was undated,—a date being affixed to the relative oath of the petitioner, and to the warrant granted by the Justice.—(2.) Reasons of suspension founded *inter alia* on the want of any sufficient specification of the *locus delicti* in the original complaint, repelled. Crawford *v.* Wilson and Jamesons, November 19, 1838, p. 200.

7. (1.) A bill of suspension of a judgment under the above statute, on the grounds, (1st.) that the complaint was not signed on every page, and, (2d.) that the Justices are not authorised to proceed summarily, refused.—(2.) It is not necessary that a complaint or conviction under the above statute should bear, that the party complained against is an apprentice within the meaning of the acts therein recited. Morrison *v.* Khull, Dec. 6, 1841, p. 584.

8. (1.) A judgment under the above statute suspended, in respect of a decision of the Justices, in the course of the proof, finding certain evidence tendered for the defender incompetent.—(2.) Reasons of suspension founded on the want of proper instance in the complainers—the inapplicability of the statute—the irrelevancy and informality of the complaint—the insufficiency of the evidence—the fact of the conviction containing an abatement of the suspender's whole wages for the term of his imprisonment—and the circumstance of the same Justice not having acted throughout the case, repelled. Leadbitter *v.* The Garnkirk Coal Company, Dec. 6, 1841, p. 620.

9. An apprentice having been convicted of desertion, under the statute 4th Geo. IV. c. 34, and sentenced to one month's imprisonment, and he having absconded before this sentence was carried into effect, and having been apprehended two months afterwards, without a warrant, and carried before the Justice by whom the former sentence was pronounced—held, that it was competent for the Justice, without any petition being presented for the application of the former judgment, to find the apprentice guilty of deserting, and of not returning to his service, and to sentence him anew to one month's imprisonment. Duthie *v.* Birnie, May 20, 1839, p. 385.

—— 9TH GEO. IV. c. 29.

(1.) The forms of service and execution prescribed by the statute 9th Geo. IV. c. 29, do not apply to Justice of Peace Courts.—(2.) The same accuracy is not required

STATUTE.—*Continued.*

in complaints before the Justices as in Indictments before the Justiciary Court. M'Cartney *v.* Guthrie, Jan. 19, 1838, p. 23.

—— 10TH GEO. IV. c. 38. See DISCHARGING LOADED FIREARMS.

—— 2D WILLIAM IV. c. 34. See POSSESSION OF BASE COIN, UTTERING BASE COIN.

—— 2D AND 3D WILLIAM IV. c. 65. See REFORM ACT.

—— 2D AND 3D WILLIAM IV. c. 123. See FORGERY, 2.

—— 1ST VICTORIA, c. 36. See POST-OFFICE.

—— 1ST VICTORIA, c. 84. See FORGERY, 2.

—— 3D AND 4TH VICTORIA, c. 59. See WITNESS, 4.

SUBORNATION OF PERJURY.

(1.) An objection to an Indictment for subornation of perjury, that too great latitude was assumed in stating the time and place at which the offence was committed, and the means of inducement held out, repelled.—(2.) A pannel having been acquitted on a charge of theft, and being accused of having, on that occasion, suborned witnesses to commit perjury, it is competent, in his subsequent trial for the subornation, to prove that what the witnesses swore was false, even by evidence which establishes also the pannel's guilt of the theft, although that matter is properly *res judicata*.—(3.) Conviction on a charge of subornation of perjury. Sentence, transportation for seven years, with infamy. Robert Walker, March 19, 1838, p. 69.

SUSPENSION.

See STATUTES 17 GEO. III. c. 56, 4 GEO. IV. c. 34.

1. It is no ground for suspending a judgment under the statute 4th Geo. IV. c. 34, or any similar statute, that the petition to the Justices in which the proceedings originated was undated,—a date being affixed to the relative oath of the petitioner, and to the warrant granted by the Justice.—(2.) Reasons of suspension founded, *inter alia*, on the want of any sufficient specification of the *locus delicti* in the original complaint, repelled. Crawford *v.* Wilson and Jamesons, Nov. 19, 1838, p. 200.
2. A party having been sentenced by a Police court to twenty days' imprisonment, for having found a purse containing money, at a certain place, 'shortly after it had been lost,' and when 'afterwards' asked to return it, having denied having found it, and appropriated the money to her own use, a bill of suspension, brought on the grounds, (1.) that the offence charged is not a matter of criminal dittay, (2.) that there was no specification of the time when, or the place where it was committed, refused. Whitton *v.* Drummond, March 12, 1838, p. 62.

TAKING A FALSE OATH.

The taking falsely the oath prescribed by the Reform Act (Schedule I.) held not to be perjury—but found, nevertheless, to be an indictable offence at common law. John Barr, Jan. 23, 1839, p. 282.

THEFT.

1. The appropriation, by a pannel, of articles found on the highway, the owner of which is well known to him, is Theft. John Smith, March 12, 1838, p. 28.
2. A pannel convicted of Theft by appropriating to her own use money which had dropped from the pocket of a person in her company, well knowing to whom it belonged. Jane Pye, Perth, October 3, 1838, p. 187.
3. The appropriation, by a watchmaker, of a watch left by him to be cleaned or repaired, is Theft. George Brown, July 3, 1839, p. 394.
4. A boy in the employment of a bookseller, who appropriated to his own use a bank note delivered to him by his master, in order that he might get it changed, and return with, and deliver the change to him, found guilty of Theft, and sentenced to twelve months imprisonment. Robert Michie, Jan. 28, 1839, p. 319.
5. The appropriation, by a clerk, of a sum of money delivered to him, with instructions to pay it to the collector of excise, for a wine license for his master, is Theft, not breach of trust. David Field, January 22, 1838, p. 24.
6. A pannel being charged with having, while a servant in the employment of a company, received from one of the partners the sum of L.17 sterling, or thereby, in notes and silver money, for the special purpose of paying L.9 to one individual, and L.8, being the balance of said sum of L.17, to another, and having appropriated it—this found not to be a relevant charge of Theft, principally on the ground that it was not set forth that the money was to be delivered to him *in forma specifica*. Hugh Climie, May 21, 1838, p. 118.
7. A pannel who appropriated to his own use a sum of money in bank notes and silver, which he had received from his master, with instructions to deposit it in the bank—convicted of Theft; and an objection to the relevancy of the Indictment, that the crime charged amounted to breach of trust only, repelled. Thomas Paterson, July 22, 1840, p. 521.
8. A latitude of more than seven months allowed to be taken, in stating the time during which various acts of theft were committed, in respect the crime was charged to have been done with the co-operation of, and in concert with the son of the party from whom the goods were stolen. William Cattanach, Perth, October 4, 1838, p. 189.

THEFT—*Continued.*

9. Two pannels charged with theft, in respect of their having, in concert together, carried off goods described as the property of the husband of one of them,—an objection taken to the relevancy of the charge,—and the case certified to the High Court. Donald M'Leod and Wedderburn Dick or Smith, Perth, Oct. 4, 1838, p. 190.

10. A statement, subjoined to a charge of theft, that the pannel was only prevented from committing farther depredations, by being detected in the act of stealing, struck out of the Indictment. Mary Lorimer, Aberdeen, April 19, 1838, p. 100.

THREATENING LETTER.

The Jury directed to find a charge of writing and sending a threatening letter not proven, partly on the ground that the letter was proved to have been put into a different post-office from that set forth in the Indictment. Thomas Hunter and others, Jan. 3, 1838, p. 1.

UNNATURAL TREATMENT OF A CHILD.

1. Two pannels convicted of 'the cruel and unnatural treatment, and wilful and culpable neglect of an infant, by its parents or natural and legal custodiers, whereby such infant is injured in its person and health,' and sentenced to twelve months imprisonment. John and Mary Craw, November 8, 1839, p. 449.

2. Two pannels, who pleaded guilty to a charge of 'cruel and unnatural treatment, and wilful and culpable neglect of a child of tender years by its parent or custodier, whereby such child is injured in person and health,' sentenced to four months imprisonment. David and Janet Gemmell, June 5, 1841, p. 552.

UTTERING BASE COIN.

1. Certain words struck out of an Indictment under the Statute 2d William IV. c. 34, as not being warranted by its provisions. Peter Kerr or Carr, Feb. 22, 1841, p. 533.

2. (1.) A pannel being charged with contravention of the Statute 2 William IV. c. 34, § 7, opinion indicated that it is not competent to libel in the minor proposition that she has been previously convicted of the 'high crime and offence' set forth in the statute. (2.) Question, whether an extract conviction, purporting to be of the high crime and offence, was admissible in evidence. Janet Brown, June 7, 1841, p. 554.

3. A pannel having been charged, both at common law, with the offence of uttering base coin, aggravated by previous convictions, and also with contravention of the Statute 2 William IV. c. 34, § 7, held competent to libel a previous conviction of the high crime and offence created in the statute, as a common law aggravation of the principal charge. Mary White, November 5, 1841, p. 568.

UTTERING BASE COIN—*Continued.*

4. Question, whether base coin, not yet in a condition to be uttered, but to complete which, an additional process is necessary, can be held to fall under the description in the statute of coins 'resembling, or apparently intended to resemble, or pass for' current coin. Agnes Logg, Glasgow, January 11, 1839, p. 280.
5. On a trial for uttering base coin, one of the coins alleged to be bad, which was admitted to have been in the hands of the Public Prosecutor, and had been libelled on as a production, not being produced to the Jury,—held, that the best evidence of the baseness of that coin had not been brought, and the charge of uttering it accordingly found not proven. Grace M'Ginnes and Isabella Johnstone, July 16, 1839. p. 435.
6. A pannel convicted of uttering base coin, although the fact of the coin being bad was proved only by the evidence of a witness; and the coin itself, which was admitted to have been in the hands of the Public Prosecutor, and was libelled on as a production, was not shown to the Jury. Janet Laird, Glasgow, May 5, 1840, p. 503.
7. It is competent, on a trial for uttering base coin, to lead evidence of previous unsuccessful attempts to utter, without any narrative of such attempts being set forth in the Indictment. James Ritchie and Andrew Morren, November 29, 1841, p. 581.

UTTERING A FORGED BILL.

Question, whether the presentation of a bill of exchange bearing a forged subscription of a party as acceptor, to another person, to be signed by him as a drawer and indorser, can be relevantly charged as an act of uttering a forged bill. John Reid, Perth, September 23, 1841, p. 562.

VERDICT.

An objection founded on a contradiction in the terms of the verdict, sustained in arrest of judgment on one of the charges,—it being held that no explanation of the verdict was competent, after it had been recorded, and the Jury formally discharged. Thomas Hunter and others, January 3, 1838, p. 1.

WARRANT.

A judgment under the statute 4th Geo. IV. c. 34, suspended, on the ground that the party complained against was apprehended under a warrant granted merely to *convene* him before the Justices. Crawford *v.* Wilson and Jamesons, November 19, 1838, p. 200.

2. An apprentice having been convicted of desertion, under the statute 4th Geo. IV. c. 34, and sentenced to one month's imprisonment, and he having absconded before his sentence was carried into effect, and having been apprehended two months

WARRANT.—*Continued.*

afterwards without a warrant, and carried before the Justice by whom the former sentence was pronounced,—held, that it was competent for the Justice, without any petition being presented for the application of the former judgment, to find the apprentice guilty of deserting, and of not returning to his service, and to sentence him anew to one month's imprisonment. Duthie *v.* Birnie, May 20, 1839, p. 385.

WARRANT OF OPEN DOORS.

Two pannels having been charged with deforcement, by obstructing the execution of a warrant of open doors, granted by a Sheriff, for the purpose of removing goods poinded under a Small Debt decree,—the relevancy of the Indictment objected to, on the ground that a Sheriff has no power to grant such a warrant, and the case certified to the High Court. Alexander M'Lean and Malcolm M'Gillivray, Inverness, September 25, 1838, p. 185.

WILFUL FIRE-RAISING.

See FIRE-RAISING.

WITNESS.

See MEDICAL WITNESS.

1. An outlaw is inadmissible as a Witness, and the Court will not, without a previous application, repone him against the sentence of outlawry, in order to make his evidence competent. Duncan Hunter, Inverness, Sept. 24, 1838, p. 181.
2. (1.) A father adduced to prove an assault on him by his child has not an option to decline giving evidence. (2.) A mother examined as an exculpatory witness in the trial of her daughter, after having been informed of her option to decline giving evidence in the case. Agnes Blair or Munro, March 12, 1840, p. 496.
3. A boy between ten and eleven years of age, found inadmissible as a witness against his father, even in a trial for an injury inflicted on his mother. Jacob Campbell, November 7, 1838, p. 196.
4. A girl under the years of pupilarity found, under the provisions of the Statute 3d and 4th Victoria, c. 59, to be an admissible Witness against her father. Mary Ann Cairns and others, Feb. 15, 1841, p. 531.
5. It is no objection to the admissibility of a Witness for the prosecution, that a reward has been offered by a royal proclamation to any person who should give 'such information and evidence as shall lead to the discovery and conviction' of the guilty party. Thomas Hunter and others, Jan. 3, 1838, p. 1.
6. It is no objection to the admissibility of a foreign witness, that, in order to induce him to come to this country to give evidence,

WITNESS—*Continued.*

he has received, besides his expenses, a sum considerably greater than what he could have derived at home from the profits of his trade. Alexander Humphreys or Alexander, April 29, 1839, p. 356.

7. A number of Witnesses to a defence of *alibi*, who, shortly after the commission of the crime, had signed, in presence of one another, a joint certificate, and at the same time conversed together in regard to the times, places, and circumstances to which the defence referred, allowed to be examined *cum nota*, principally on the ground that there was not sufficient proof of agency to connect the pannel with the procuring of the certificate,—but a unanimous opinion expressed by the Court, that if the act of one pannel had disqualified the Witnesses from giving evidence in his favour, they could not have been received in favour of the others. Thomas Hunter and others, January 3, 1838, p. 1.
8. In a trial for assault, it is no objection to the admissibility of the injured party, that he has taken steps for prosecuting an action of damages against the pannel in the Civil Court. Peter Leys, March 12, 1839, p. 337.
9. In a charge of forging the signatures to a Bond of Caution, it is no objection to the admissibility of a witness, that he was the professional agent employed by the pannel in procuring the bond. Hector M'Lean, Inverness, September 24, 1838, p. 183.
10. (1.) An objection to the admissibility of a Witness, founded on a statement that he was a different person from that specified in the list annexed to the Indictment, sustained, after the Jury was sworn. (2.) A similar objection, founded on an alleged error in regard to the county in which the witness's residence was situated, repelled. John M'Cabe and others, Glasgow, Jan. 12, 1838, p. 20.
11. An objection to the erroneous designation of a Witness, taken before the Jury was sworn, repelled, in respect it was not alleged for the pannels that they had made any inquiries regarding him. George M'Kay and others, Inverness, April 13, 1839, p. 344.
12. Held competent to strike certain letters out of an Indictment, for the purpose of correcting an error in the designation of some of the witnesses. Daniel Mackenzie and others, Glasgow, May 4, 1839, p. 354.
13. Circumstances in which the Court doubted the competency of examining a Witness, as to what he had been told by a person proved to be alive, regarding the proceedings of an illegal association, of which that person was a member, and the Prosecutor in consequence, declined to press the question. Thomas Hunter and others, January 3, 1838, p. 1.

WITNESS—*Continued.*

14. Two Witnesses examined without objection, as to the account which they had received of the transaction, which was the subject of trial, from a person since deceased—not the party injured by the crime. Thomas Hunter and others, January 3, 1838, p. 1.
15. A Witness is not bound to answer a question inferring against him the crime of adultery. Alexander Stephens, Aberdeen, April 20, 1839, p. 348.
16. Circumstances in which proof was allowed on the part of the pannel, that a witness had, when not on oath, made a statement different from that to which he swore in the witness-box. Alexander Stephens, Aberdeen, April 20, 1839, p. 348.
17. Held incompetent for the counsel for the pannel to contradict the evidence of a witness, by reading to the Jury a deposition made by him as a witness in a civil process, although the process, and consequently the deposition, were included in the productions libelled on. James Stevens, March 15, 1839, p. 342.
18. (1.) It is incompetent to contradict the evidence of the injured party, as to the transaction which is the subject of trial, by proving on his cross-examination, that he had given a different account of it three days afterwards. (2) The injured party having denied on cross-examination, that he told a particular witness, some time after the injury, that he kept the house in order to give him a better claim of damages against the pannel,—held, that it was incompetent to contradict this statement by the evidence of the witness referred to. Donald Kennedy, Dec. 3, 1838, p. 213.
19. A party on whom an assault was charged to have been committed, having denied on his examination, that he received any injury from the pannel,—held competent to examine a subsequent witness, in regard to a charge made by that party against him *de recenti*, not with a view of contradicting the evidence of the first witness, but as relative to a direct accusation of guilt, made in the pannel's presence, and to himself. David Alexander, Ayr, April 27, 1838, p. 110.

END OF VOL. II.

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